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n the Supreme Court of the United States

OCTOBER TERM, 1938

No. 771

UNITED STATES OF AMERICA, APPELLANT

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED TATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Two opinions were rendered by the District Court. e first (R. 105) was rendered in denying and over- ng certain motions of the United States to strike ignated portions of the several answers. The ond (R. 743) was rendered after trial. Neither nion is as yet reported.

JURISDICTION

urisdiction of the Court rests on Section 2 of the of August 24, 1937, c. 754, § 2, 50 Stat. 752 (28 S. C., Supp. IV, 349a). The decree of the District rt was entered March 21, 1939. The petition for eal was allowed March 21, 1939. The case was keted in this Court on March 23, 1939. The Court ed probable jurisdiction on March 27, 1939.

THE STATUTE AND THE REGULATION THEREUNDER INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C., Supp. IV, §§ 601 *et seq.*, hereinafter referred to as "the Act." An annotated compilation of the Act is attached to this brief as "Appendix A."

The regulation involved is Order No. 27, Order * * * Regulating Such Handling of Milk in the New York Metropolitan Marketing Area As Is In Interstate Commerce, and As Directly Burdens, Obstructs, or Affects Interstate Commerce, issued on August 5, 1938 (effective September 1, 1938) by the Secretary of Agriculture of the United States pursuant to the provisions of the Act, and is hereinafter referred to as "Order No. 27." A copy of Order No. 27 is attached to this brief as "Appendix B."

QUESTIONS PRESENTED

1. Whether the provisions of the Act authorizing and directing the issuance by the Secretary of Agriculture of orders regulating such handling of milk and its products as is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects interstate or foreign commerce, are a constitutional exercise by Congress of the power to regulate interstate and foreign commerce.

2. Whether Section 8c (5) (B) (ii) of the Act, authorizing provisions, in orders regulating the handling of milk, for a market-wide equalization pool, as applied in Order No. 27, deprives the appellees of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

3. Whether Section 8c (5) (F) of the Act, providing that a cooperative marketing association engaged in making collective sales or marketing of milk or its products for the producers thereof, shall not be prevented from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers, deprives the appellees of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether the Act provides for an unlawful delegation of legislative power.

5. Whether the District Court erred in substituting its judgment for the judgment of the Secretary of Agriculture as to the reasonableness of the terms and conditions of Order No. 27, in view of its finding that substantial evidence supporting all of the findings of the Secretary of Agriculture and all the terms and conditions contained in Order No. 27, and the reasonableness thereof, was introduced at the hearing held by the Secretary of Agriculture prior to the promulgation of Order No. 27.

5. Whether the District Court erred in setting aside the determination of the Secretary of Agriculture, approved by the President, that Order No. 27 was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, which had been determined by the Secretary to be a representative period, had been engaged in the production of milk for sale in the marketing area specified in Order No. 27.

7. Whether all of the terms and conditions of Order No. 27 are authorized by the Act, and whether Order No. 27 is valid and enforceable.

STATEMENT

I. The Proceedings Below

On October 27, 1938, the United States, pursuant to the provisions of Section 8a (6) of the Act (Appendix A, p. 2), commenced this action in the District Court of the United States for the Northern District of New York against the appellees Rock Royal Co-operative, Inc.; Central New York Co-operative Association, Inc.; and Schuyler Junction New York Milk Shed Co-operative, Inc. The complaint sets forth that the appellees are handlers of milk subject to Order No. 27; that the Order was issued in accordance with the provisions of the Act; and that the appellees were handling milk in violation of the provisions of the Order and refused to comply with its provisions. The complaint sought an injunction restraining the appellees from con-

tinuing to handle milk in violation of the Order and a mandatory injunction requiring them to comply with its provisions (R. 1).[1]

On November 19, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, petitioned for leave of court to intervene as a plaintiff, and filed a complaint substantially identical with the complaint of the United States, and sought the same relief (R. 47, 48).

On November 23, 1938, the United States commenced an action against the appellee Jetter Dairy Company, Inc., in the same court making similar allegations and seeking similar relief, except that no alternative relief under Official Order No. 126 was sought (R. 40).

On December 2, 1938, the two cases were consolidated with the consent of all parties (R. 61).

Thereafter, on December 15, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, having been granted leave of court to intervene as a party plaintiff, filed a complaint as intervening plaintiff in the consolidated

[1] The complaint also sets forth the issuance, by the Commissioner of Agriculture and Markets of the State of New York, of Official Order No. 126 regulating, in the same manner as Order No. 27, such handling of milk in the New York Metropolitan marketing area as is strictly intrastate in character and not subject to federal regulation, and seeks, in the alternative, injunctive relief requiring the appellees to compy with the provisions of Official Order No. 126, if the court should find that they are not subject to Order No. 27.

cause against the defendant Jetter Dairy Company, Inc. (R. 55).

In due time all of the appellees filed answers. The answers of Rock Royal Co-operatives (R. 63); Schuyler Junction New York Milk Sh Co-operative (R. 70); and Jetter Dairy Company (R. 85), admitted the issuance of Order No. 27 by the Secretary of Agriculture and the issuance of Official Order No. 126 by the Commissioner of Agriculture and Markets of the State of New York; admitted that producer-referenda were conducted by the Secretary of Agriculture and the Commissioner of Agriculture and Markets, respectively, to determine whether the orders were favored by producers as required by the respective statutes under which they were issued, admitted that the Secretary of Agriculture made the determination required by Section 8c (9) of the Act and that this determination was approved by the President; admitted that E. M. Harmon was duly designated as Market Administrator under both orders and that he prescribed the necessary forms to be used by handlers in making the reports required under the orders; admitted that each of the appellees operated a duly approved milk plant for receiving milk to be sold in the marketing area, as defined in the orders; challenged the validity of both orders on the ground that the producer-referenda were illegal and ineffective to put them into operation, and that the orders and the statutes under which they were issued violated the Fifth and Fourteenth Amendments, respectively. The answer of the appellee

Central New York Co-operative Association (R. 76), denied knowledge as to most of the allegations of the complaint, challenged the validity of the orders and the statutes pursuant to which they were issued, and set up the additional defense that by reason of its form of organization it was, in effect, a producer and not subject to the provisions of either order.

The answers of Rock Royal Co-operative, Inc.; Schuyler Junction New York Milk Shed Co-operative, Inc.; and Jetter Dairy Company, Inc., also set up certain affirmative defenses. The United States filed a motion to strike these affirmative defenses on the ground that the matters alleged and the issues raised therein (a) failed to state a legal defense to plaintiff's claim, and (b) were redundant, immaterial, impertinent, and scandalous (R. 83). Thereafter, on December 13, 1938, the Jetter Dairy Company, Inc., filed its amended answer, modifying in some respects the allegations contained in its affirmative defenses (R. 85), and the United States filed a motion to strike certain designated portions of the affirmative defenses from the amended answer on the same grounds as those of its motion to strike the affirmative defenses from the original answer (R. 103, 104).

Throughout all of the affirmative defenses runs the central theme that the promulgation of Order No. 27 was part of a conspiracy entered into by an organization of producer cooperatives known as the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. (hereinafter called the "Bargaining Agency"), the Dairymen's League Cooperative As-

sociation, Inc. (hereinafter called the "League"), and others, to secure a monopoly in the fluid milk business in New York City by driving the appellees and others out of business, and to use Order No. 27 and Official Order No. 126 as a means of accomplishing that objective. The sections of the several answers which the United States moved to strike apparently attempted to present four separate defenses to the action brought by the United States, as follows:

> (1) Order No. 27 is invalid because its enactment was brought about by the Bargaining Agency, the League, and others as part of a conspiracy to injure the appellees by using the statutes and agencies of the United States and of the State of New York as instruments of coercion, monopoly, and restraint of trade.
>
> (2) Order No. 27 is invalid because certain handlers, including the League, have attempted to use it as a means of securing a monopoly.
>
> (3) Order No. 27 is invalid because it may be used as a means of creating a monopoly and tends to create a monopoly.
>
> (4) Order No. 27 is invalid because, prior to the referendum among producers, the Bargaining Agency, and the League, in carrying out the alleged conspiracy, carried on a campaign of false and misleading propaganda with the purpose of deceiving producers as to the nature of the order and thereby influencing them to vote in favor of the order.

The District Court heard argument on the motions to strike on December 13, 1938, and on December 22,

1938, rendered its written opinion (R. 105) overruling and denying the motions to strike, and entered its order accordingly (R. 104).

Thereafter, the Bargaining Agency and the League, at the suggestion of the District Court, and with the consent of all parties, were permitted to intervene in the consolidated cause for the purpose of defending against the acts charged against them by the appellees in those portions of the several answers containing the affirmative defenses designated in the aforesaid motions to strike.

The case went to trial for final decree on December 27, 1938, upon a stipulation with exhibits attached, oral testimony and exhibits, and was argued and submitted by counsel for the respective parties on January 18, 1939.

On February 23, 1939, the District Court rendered its written opinion (R. 743) holding that:

(1) The appellees are subject to Order No. 27, if such order is valid, and, therefore, it is unnecessary for the court to pass upon the validity of the state order.

(2) Order No. 27 unlawfully discriminates in favor of large cooperatives and deprives proprietary handlers and small cooperatives, such as the appellees, of their property without due process of law, in violation of the Fifth Amendment.

(3) This discrimination is necessarily present in Order No. 27 by reason of the provisions of the Act, particularly the provisions of Section 8c (5) of the Act, specifying the terms

which an order pertaining to milk shall contain; and, therefore, the Act is unconstitutional.

(4) The Secretary's determination, approved by the President pursuant to Section 8c (9) of the Act, that Order No. 27 was approved or favored by more than two-thirds of the producers, producing milk for sale in the marketing area, was ineffective to put Order No. 27 in operation, because the referendum among producers, conducted by the Secretary pursuant to Section 8c (19) of the Act, was influenced by false and misleading propaganda in favor of the Order carried on by the Bargaining Agency and the League and by misleading statements contained in a pamphlet issued by the Department of Agriculture.

(5) "The Court does not find any sections of the Act which clearly and definitely authorize" Sections 5 and 6 of Article VII of Order No. 27, and, "if there be none, the order does not comply with the Act."

The District Court entered its findings of fact and conclusions of law on March 21, 1939 (R. 127), and on the same day entered its final decree, dismissing the action (R. 743). The findings of fact and conclusions of law proposed by the United States, with the District Court's action thereon noted in the margin, appear in the record, at pages 167–189.

II. The Statute Involved

Section 1 of the Act declares that "the disruption of the orderly exchange of commodities in interstate

commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

Section 2 of the Act declares that it is the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this title to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." Section 2 also provides that the base period in the case of all agricultural commodities, except tobacco and potatoes, shall be August 1909 to July 1914 (Appendix A, pp. 1–2). This provision is qualified by Section 8e of the Act, which provides that, if the Secretary finds and proclaims as to any commodity that the purchasing power during the base period specified in Section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period shall be August 1919 to July 1929, or all that portion thereof for which statistics are available (Appendix A, p. 13). In making Order No. 27 the Secretary of Agriculture found it necessary to exercise the authority conferred by Section 8e, and

designated August 1921 to July 1929 as the base period (Appendix B, p. 2.)

This provision is further qualified by Section 8c (18) (Appendix A, p. 11) which requires the Secretary, whenever he finds that the prices which will give milk or its products a purchasing power equivalent to their purchasing power during the base period as determined pursuant to Section 2 and Section 8c of the Act are not reasonable in view of the price of feeds, the available supplies of feeds and other economic conditions which affect market supply and demand for milk and its products, to fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. In promulgating Order No. 27 the Secretary found that the minimum prices fixed in accordance with its terms are such prices as will reflect the factors enumerated in the foregoing section, insure a sufficient quantity of pure and wholesome milk, and be in the public interest (Appendix B, p. 2).

Two methods are provided in the Act to be used in accomplishing the statutory purpose. The first of these is provided in Section 8b, which authorizes the Secretary to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity in interstate commerce.

The other method is the issuance of orders by the Secretary regulating the handling of agricultural commodities in interstate commerce. Orders may be issued with or without the execution of a marketing

reement. The more important provisions of the t dealing with the issuance of orders are found in bsections (1), (2), (3), (4), (5), (7), (8), (9), (10), 2), (15), and (19) of Section 8c. Section 8c (1) thorizes the Secretary to issue, and from time to ne amend, orders applicable to handlers of the ricultural commodities specified in Section 8c (2). ction 8c (2) specifies milk as one of the commodities to which an order may be made. The orders are regulate "only such handling of such agricultural mmodity, or product thereof, as is in the current interstate or foreign commerce, or which directly rdens, obstructs, or affects interstate or foreign mmerce in such commodity or product thereof" ppendix A, p. 3). The term "interstate or foreign mmerce" is defined in Section 10 (j) of the Act ppendix A, p. 15).

Section 8c(3) requires the Secretary to give notice and opportunity for, a hearing upon proposed ders. Section 8c (4) provides that the Secretary all issue an order if, upon the evidence introduced such hearing, he finds (in addition to other dings which he is required to make) that the issuce of the order will tend to effectuate the declared licy of the Act (Appendix A, pp. 3–4).

Subsections (5) and (7) of Section 8c set forth ecifically the terms and conditions which may be luded in orders regulating the handling of milk ppendix A, pp. 4–5, 6–7). The provisions of se subsections will be discussed later in this brief connection with the provisions of Order No. 27

(see pp. 23 to 33, *infra*). Subsection (10) provides that no order shall be issued unless it regulates the handling of the commodity in the same manner as a marketing agreement upon which a hearing has been previously held (Appendix A, p. 9).

Section 8c (8) provides, subject to the qualifications expressed in subsections (9), (12), and (19) of Section 8c, that no order shall become effective unless handlers who handle not less than 50 percent of the volume of the commodity in the area covered by the order have signed a marketing agreement entered into pursuant to Section 8b, and unless the Secretary determines that the issuance of the order is approved or favored by at least two-thirds of the producers producing the commodity for sale in the marketing area during a representative period, or by the producers of two-thirds of the volume of the commodity sold during a representative period within the marketing area (Appendix A, pp. 7–8).

Section 8c (9) provides that, notwithstanding the refusal or failure of handlers to enter into a marketing agreement, an order shall become effective if the Secretary, with the approval of the President, determines (a) that the failure or refusal of the handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act, and (b) that the issuance of the order is the only practicable means of advancing the interest of the producers of the commodity pursuant to the declared policy, and is approved or favored by at least two-thirds of the producers who have been engaged in the

production of the commodity covered by the order, or by producers who have produced for market at least two-thirds of the volume of the commodity covered by the order (Appendix A, pp. 8–9).[2]

Section 8c (19) provides that the Secretary of Agriculture may conduct a referendum to determine whether the issuance of an order is approved or favored by producers and that the requirements of approval or favor shall be held to be complied with if, of the total number of producers or volume of production represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required (Appendix A, p. 12).

Section 8c (12) provides that the Secretary shall "consider the approval or disapproval by any cooperative association of producers bona fide engaged in marketing the commodity or product thereof covered by such order or in rendering services for or advancing the interests of the producers of such commodity as the approval or disapproval of the producers who

[2] In the instant case the Secretary of Agriculture, on August 5, 1938, tentatively approved a marketing agreement regulating, in the same manner as Order No. 27, the handling of milk in the marketing area. Opportunity was given to all handlers to execute this agreement. Handlers of more than 50 percent of the volume of milk covered by Order No. 27 which was marketed within the marketing area had failed or refused to sign said marketing agreement on August 24, 1938, on which date the Secretary of Agriculture, having previously conducted a referendum pursuant to the provisions of Section 8c (19), made, with the approval of the President, the determinations required by Section 8c (9). The determination of the Secretary was based on the number of producers and not on the volume of production represented in the referendum.

are members of, stockholders in, or under contract with, such cooperative association of producers" (Appendix A, p. 9).

Section 8c (15) provides for administrative review by the Secretary on the petition of a handler alleging that any provision of an order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or exemption therefrom. The Secretary's ruling on such petition is appealable to the district court (Appendix A, p. 10). The filing of such a petition in good faith, and not for purposes of delay, stops the running of the criminal provisions contained in Section 8c (14) while such proceedings are pending, but is not a bar to the prosecution of an action by the United States pursuant to Section 8a (6) of the Act which confers jurisdiction upon the district courts of the United States to enforce, and to prevent and restrain any person from violating, any order issued under the Act (Appendix A, p. 2).

Section 10 (i) directs the Secretary upon request of the duly constituted authorities of any state, "in order to effectuate the declared policy of this title, and in order to obtain uniformity in the formulation, administration, and enforcement of federal and state programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any state * * *," and authorizes the Secretary to cooperate with such authorities and to issue orders complementary to

orders or other regulations issued by such authorities (Appendix A, p. 15).[3]

III. Order No. 27

A. The Issuance of Order No. 27

The appellees in effect concede that all requirements of the Act with reference to the issuance of orders were complied with by the Secretary in issuing Order No. 27 (R. 251–257, 269, 272), but contend that the Secretary's determination that the order was approved by more than two-thirds of the producers, as required by Section 8c (9) of the Act (Appendix A, pp. 8–9), was incorrect and not supported by substantial evidence because of alleged misrepresentations in connection with the referendum and was therefore invalid and ineffective to place Order No. 27 in operation. The validity of the Secretary's action in this respect is discussed, *infra*, pp. 166–171.

B. The Problem With Which Order No. 27 Deals

Before discussing the provisions of Order No. 27, a brief explanation of certain aspects of the milk in-

[3] Order No. 27 is complementary to Official Order No. 126 (R. 402) issued by the Commissioner of Agriculture and Markets of the State of New York pursuant to the provisions of the Rogers–Allen Act (N. Y. Laws of 1937, chapter 383), which authorizes the Commissioner to cooperate with the Federal Government in its control of prices of milk handled in interstate commerce and to join with the federal authorities in conducting joint investigations and holding joint hearings, to issue joint and concurrent orders or orders supplementary to those of the Federal Government, and to designate a joint agent, or joint agencies, to carry out and enforce such joint, concurrent or supplementary orders.

dustry, developed in the evidence, may be of assistance in understanding the terms of the order, its purpose, and the way in which it operates.

One of the most important uses of milk is for consumption in fluid form as an article of diet. If the producers in a given area could produce just enough milk at all seasons of the year to satisfy the demands of the consumers for fluid milk, or if milk could be stored for a considerable period of time, the problems with which this order deals would not exist. But the nature of milk prevents an exact correlation between supply and demand and makes the storage of milk impossible. The demand by consumers for milk fluctuates from day to day and, to a certain extent, from season to season. In normal conditions these fluctuations are not great in amount, but it is necessary for dealers to have available every day throughout the year a supply of milk adequate to meet those fluctuating demands. Because milk cannot be stored the dealers must so conduct their business that they receive every day at every season of the year enough milk to supply all the possible demands which may be made upon them by consumers (Pl. fg. 12, R. 171).

The supply of milk available from producers is subject to seasonal fluctuations which, even under normal conditions, are substantial. The amount of milk produced by a cow depends upon the weather, the feed supplied to the cow, and the cow's stage of lactation. Many producers, particularly those with a small number of cows, cannot arrange to have an equal number of cows producing milk at all seasons

of the year; a producer in this situation therefore has more milk to dispose of in some seasons of the year than in others. Because of these characteristics of the production of milk the number of cows necessary to produce the supply required by all consumers in a given market in the seasons when production is smaller will produce an amount in excess of the supply required for that market in seasons when production is larger (Pl. fg. 12, R. 172).

Thus, if the great metropolitan area of New York is to have an adequate supply of milk, the farmers who furnish that supply must produce from day to day and from season to season more milk than is required for fluid purposes. The amount of this surplus milk will vary from season to season, but in any given day or period, after all the demands of the consumers for fluid milk have been satisfied, a surplus remains which will not be used for fluid consumption. This surplus must be disposed of as condensed milk or butter, or in some other form, in competition with milk which is not required to meet the expensive sanitation requirements imposed by local health regulations on milk produced for consumption in fluid form. Because of this competition, surplus milk commands a price substantially lower than the price received for fluid milk (Pl. fg. 12, R. 172).

A supply of surplus milk is not only inevitable, but desirable. However, stable market conditions depend upon the equitable distribution of the burden of that surplus among all persons engaged in the industry. In the absence of some form of regulation the pressure

of unrestrained competition tends to compel those engaged in handling milk to attempt to shift the burden of the surplus to others. A handler who finds that his supply of surplus milk is increasing is likely to attempt to dispose of that milk in fluid form. That disposition can best be accomplished by cutting the price at which fluid milk is offered for sale. This leads to retaliatory price cutting by other handlers whose market for fluid milk is threatened. This price cutting inevitably leads to a decrease in the price which the handlers pay to the producers and to disorderly marketing conditions (Pl. fg. 12, R. 172).

Although price cutting results in diminished returns to producers, it does not necessarily result in a decrease in the price paid by the ultimate consumer because the resulting saving is often absorbed as profits by intervening middlemen. Furthermore, diminished returns to the producer lead to one result which is detrimental to the ultimate consumer. Milk is an excellent medium for the growth of bacteria. Consequently it must be produced and handled under strictly sanitary conditions, the maintenance of which is expensive. When the competitive pressure becomes great, the tendency on the part of both producers and handlers is to relax in their vigilance and care against the contamination of milk. The result is that the supply of milk available to the consuming public deteriorates in quality.[4]

[4] The problems which have been described above were well summarized in *Nebbia* v. *New York*, 291 U. S. 502, as follows (pp. 516–518):

The regulation of milk in the State of New York, nd more especially in the New York metropolitan

"Milk is an essential item of diet. It cannot long be tored. It is an excellent medium for growth of bacteria. hese facts necessitate safeguards in its production and andling for human consumption which greatly increase the ost of the business. Failure of producers to receive a easonable return for their labor and investment over an xtended period threatens a relaxation of vigilance against ontamination.

* * * * * *

"The fluid milk industry is affected by factors of instabil-y peculiar to itself which call for special methods of control. nder the best practicable adjustment of supply to demand he industry must carry a surplus of about 20 percent, ecause milk, an essential food, must be available as emanded by consumers every day in the year, and demand nd supply vary from day to day and according to the season; ut milk is perishable and cannot be stored. Close adjust-ent of supply to demand is hindered by several factors ifficult to control. Thus surplus milk presents a serious roblem, as the prices which can be realized for it for other ses are much less than those obtainable for milk sold for nsumption in fluid form or as cream. A satisfactory abilization of prices for fluid milk requires that the burden surplus milk be shared equally by all producers and all stributors in the milkshed. So long as the surplus burden unequally distributed the pressure to market surplus milk fluid form will be a serious disturbing factor. The fact that e larger distributors find it necessary to carry large quan-ties of surplus milk, while the smaller distributors do not, ads to price cutting and other forms of destructive competi-on. Smaller distributors, who take no responsibility for e surplus, by purchasing their milk at the blended prices e., an average between the price paid the producer for ilk for sale as fluid milk, and the lower surplus milk price id by the larger organizations) can undersell the larger stributors. Indulgence in this price cutting often compels e larger dealer to cut the price, to his own and the pro-cer's detriment."

milk marketing area, has been a matter of grave concern to the State of New York for a number of years.[5]

Successive investigations of the milk industry have been made and successive attempts have been made to regulate the New York metropolitan milk marketing area. Prior to 1937, the last attempt was the creation by the Legislature of the State of New York in April 1933 of a Milk Control Board with broad powers to regulate the dairy industry of the state, including the power to fix prices to be paid to producers and to be charged to consumers for milk. As a result of the inability of the state to regulate the milk which moved in the current of interstate commerce, handlers purchased their milk in other states at prices lower than those fixed by the Milk Control Board, and the operation of the order broke down. The statute creating the Milk Control Board was enacted for only one year at a time, and in 1937 it was allowed to lapse (Pl. fg. 12, R. 173).

[5] As was pointed out by this Court in *Nebbia* v. *New York* 291 U. S. 502, at pages 521–522:

"Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes have been carried into the general codification known as the Agriculture and Markets Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control."

C. THE PROVISIONS OF ORDER NO. 27

Order No. 27 regulates such handling of milk in the New York metropolitan milk marketing area as is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce. The New York metropolitan milk marketing area is defined to include the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York (Appendix B, p. 3).

Article II of Order No. 27 provides for the appointment by the Secretary of Agriculture of a Market Administrator with power to administer the terms and provisions of Order No. 27 and to receive, investigate and report to the Secretary complaints of violation of the order (Appendix B, p. 3). The appointment of a Market Administrator is authorized by Section 8c (7) (C) of the Act (Appendix A, p. 7).

Article III of Order No. 27 establishes nine separate classifications of milk ranging in value from Class I, which includes fluid milk, chocolate milk, and whole-milk drinks, down to Class IV-B, which is American Cheddar cheese (Appendix B, pp. 4–5). The milk is classified in accordance with the form in which it is utilized at, or is moved from, the plant at which received from producers except that, in certain cases where milk is moved to a second plant, it may be classified in accordance with its utilization at such second plant. Section 8c (5) (A) of the Act specifically authorizes the classification of milk in accordance with its use and the fixing of minimum

prices to be paid by all handlers for milk in each such classification (Appendix A, p. 4).

Article IV prescribes the formulas by means of which the Market Administrator computes the price to be paid for each class of milk (Appendix B, p. 6). The Market Administrator simply performs the mathematical function of computing the prices in accordance with these formulas. The prices fixed by Article IV are minimum, and not maximum prices, and nothing in the order prevents a handler from paying, or a producer from demanding, more than the minimum prices.

Article IV further provides that any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum class prices. Specific authority for this provision is found in Section 8c (5) (A) of the Act (Appendix A, p. 4). With the exception of this provision fixing minimum prices at which a cooperative may sell to other handlers, the order does not purport to regulate the price at which a handler may sell milk either at wholesale or retail.

Article IV further provides that the minimum prices for Class I (fluid milk) and Class II–A (fluid cream) apply to all milk in these classes which is sold in or passes through a plant in the Marketing Area. The minimum prices for all other classes apply to all milk of a handler in these classes regardless of where sold except that, if a handler sells Class I

milk outside of the marketing area the minimum prices do not apply to the percentage of his milk in the designated manufactured milk classes equal to the percentage of his total milk which is sold outside of the marketing area as Class I.

The minimum class prices computed and announced by the Market Administrator in accordance with Article IV fix the cost of milk to all handlers. By multiplying the total quantity of milk utilized by all handlers by the class prices the total return due to all producers is computed. Articles VI and VII provide an effective, practicable, and equitable method for distributing the amount of money thus computed among all producers. This method of payment has two important aspects: (1) the payment of the uniform price, and (2) the operation of the Producer Settlement Fund (Appendix B, pp. 10–14).

The Uniform Price.—Where a handler utilizes milk in a number of classes it is not possible to tell in which class the particular milk delivered by a particular producer was utilized. Even in the absence of an order it would be necessary for the handler to pay to each producer a price which represents a composite of the value of all the milk which the handler disposes of in fluid form and the value of all the milk utilized in the various surplus classes. Accordingly, Article VII, Section 1 provides for the payment of a uniform price to producers by all handlers except cooperative associations (Appendix B, p. 12). The reasons for this exception and the

effect thereof are discussed, *infra* (pp. 48–52, 143–149). This uniform price represents the blended value per hundredweight of all the milk in all classes utilized by all handlers and consequently, even though the class prices remained the same, would vary from month to month depending upon the percentage of milk utilized in the different classes by all handlers subject to the order.

The directions for computing the uniform price are found in Article VI (Appendix B, pp. 10–12). The method of computation is illustrated by the following simplified hypothetical example:

Assuming that—

(1) There are only two handlers, A and B, in the market, and each handles exactly one-half of the milk;

(2) The total amount of milk subject to the order which is handled during the particular month amounts to 20 hundredweight;

(3) Handler A utilizes all his milk as fluid milk (Class I);

(4) Handler B utilizes all his milk in the manufacture of butter (Class IV–A);

(5) The Class I price is $2.50 per hundredweight, and the Class IV–A price is $1 per hundredweight,

a computation of the uniform price for this delivery period would be as follows:

A's net pool obligation, 10 cwt. at $2.50=$25.

B's net pool obligation, 10 cwt. at $1=$10.

Total value of milk delivered by all producers=$35.

Total amount of milk delivered = 20 cwt.

Uniform price would be $\frac{\$35}{20} = \$1.75$.

Of course in actual operation the computation of the uniform price is more complicated because of the large number of handlers and classes of milk involved and the fact that many handlers operate more than one plant, and because additional steps are required to compute and deduct from the total value the payments authorized by Sections 5 and 6 of Article VII for services to the market as a whole which inure to the benefit of producers, and to make proper adjustments to reflect differentials for butter fat variation and the location of plants as required by Section 1 of Article VI.[6]

The Producer Settlement Fund.—The purpose of providing for the payment to producers of a uniform price reflecting the value of both the fluid milk and the surplus milk is to distribute the burden of the surplus milk equitably among all producers. This distribution is accomplished through the operation of the Producer Settlement Fund, which the Market Administrator is required to establish and maintain pursuant to Article VII, Section 7, of the Order (Appendix B, p. 14).

The effect of Order No. 27 is to create a market-wide pool of milk so that each handler, in effect, purchases his milk at the class prices from a pool created by all porducers supplying milk to the market and

[6] Defendants' Ex. No. 37 (R. 359, 667) shows the Market Administrator's computation of the uniform price for the month of November 1938.

not from the individual producers who deliver the milk to him. It may happen that, by reason of having a utilization of milk higher than the average for the market, a handler will be obligated to pay more for his milk than the producers who delivered the milk to him are entitled to receive. In such case he pays the uniform price to his producers and pays the balance to the Market Administrator. The Market Administrator does not retain the amount of these payments but, in turn, pays the money over to handlers who, by reason of having a greater utilization of milk in the lower classes, are obligated to pay for their milk less than their producers are entitled to receive. The Market Administrator pays to each such handler a sum which, when added to the total cost of the handler's milk at the class prices, will enable him to pay his producers the uniform price.

Authority for the payments to the Producer Settlement Fund is found in Section 8c (5) (C) of the Act (Appendix A, p. 5). It should be emphasized that the money involved in the payments to the Producer Settlement Fund is not money belonging to the handlers, because all handlers pay the same class prices for milk used, but is money which represents a part of the value of the milk delivered by producers. The payments are merely an important step in the distribution of the total value of the milk among all the producers in the market.

The operation of the Producer Settlement Fund may be illustrated by referring again to the hypothetical example appearing on page 26, *supra*.

In accordance with the requirements of Section 1 of Article VII (Appendix B, p. 12), Handler A will pay to his producers a total of $17.50, representing 10 hundredweight of milk received, at $1.75 per hundredweight, and, in accordance with Section 8 of Article VII (Appendix B, p. 14), will pay the remaining $7.50 to the Producer Settlement Fund. In accordance with the provisions of Section 9 of Article VII (Appendix B, p. 14), Handler B will receive from the Producer Settlement Fund $7.50 which, together with the $10 representing the value of the 10 hundredweight of milk delivered to him according to the use which he has made of it, enables Handler B to pay all of his producers at the uniform price of $1.75 per hundredweight.

These payments to producers are subject, of course, to the transportation and location differentials and the butterfat differential provided for in Sections 2 and 3 of Article VII (Appendix B, p. 12).

Article VIII (Appendix B, p. 15) requires each handler to pay to the Market Administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handlers and which was utilized in Classes I, II–A, and II–B, as his pro rata share of the cost of the administration of the order. The exact amount is determined by the Market Administrator, subject to review by the Secretary. At the time of the trial below the amount determined was 2 cents per hundredweight. This provision of

Order No. 27 is authorized by Section 10 (b) (2) of the Act (Appendix A, p. 14).

Provisions Applicable to Cooperative Associations.— Any realistic approach to the problem of regulating the handling of milk must recognize the cooperative association as a separate and distinct type of organization requiring special treatment. The cooperative is composed of producers, who have their milk collected and sold by the cooperative which then distributes the proceeds among them. To the extent that it engages in the handling of milk it may be a handler but even in that case it is a handler composed of producers whose milk it handles. Both the Act and Order No. 27 recognize this dual nature of a cooperative.

Article I of Order No. 27 defines "handler" to include "a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association receives payment" (Appendix B, p. 3).

As a handler, the cooperative is required to pay the minimum class prices fixed by the order, and to make the same payments to the Producer Settlement Fund as any other handler. In other words, the cooperative is required to participate in the market-wide pool and, in effect, to purchase its milk from the pool created by all producers and not merely from the producers who are members of the cooperative. Otherwise such a cooperative would

not carry its fair share of the market-wide burden of the surplus milk

The cooperative is not, and cannot, by reason of Section 8c (5) (F) of the Act (Appendix A, p. 5), be required to pay to its producers each month the full uniform price (Article VII, Section 1; Appendix B, p. 12).

The producers who deliver milk to a cooperative association occupy a dual relationship to the cooperative. They are producers of the milk sold and as such receive the proceeds of its sale. But, as members of the association they are also participants in a handling enterprise. As such they share not only its income but also its cost. If a producer owned stock in a proprietary corporation which was conducting a handling enterprise, he would receive the uniform price each month for milk sold to the corporation, and his share in the profits or losses of the handling enterprise would be reflected in the accounts of the corporation. In the case of a cooperative, these profits or losses are reflected directly in the amount returned to the producer for his milk. The amount returned to its producer members by a cooperative therefore varies in accordance with the net returns on its operations in marketing the milk of its members. Furthermore, a cooperative association is a service organization and normally performs many services for its members, such for example as weighing and testing the milk of its members and handling all the milk of all its members even though no profitable market exists for all such milk. The expenses incurred in performing such services may

preclude the possibility of the cooperative returning to its members an amount of money equal to the uniform price.

Article IV of Order No. 27 (Appendix B, p. 6) provides that any handler purchasing milk from a cooperative which is also a handler must pay not less than the minimum prices. This provision is designed for the protection of producers and is required by Section 8c (5) (F) of the Act (Appendix A, p. 5). A handler purchasing milk from another handler which is not a cooperative may pay any price that is agreed upon by contract, and the handler from whom he purchases, being obligated to pay the minimum price, may sell the milk to him at less than cost if such handler so desires. Article IV, however, prevents a handler from purchasing milk from a cooperative at less than the class prices fixed under the order.

Article VII, Section 5 (Appendix B, p. 13) provides for certain payments to cooperative associations. Inasmuch as the cooperative associations represent the producers, they have an interest in securing a utilization of milk in the market which will return to producers the highest possible uniform price. This section provides for certain payments to cooperatives to compensate them for services performed for the market as a whole. Such payments stand on the same basis as the market service payments, for which provision is made in Section 6 of Article VII (Appendix B, p. 13). These pro-

visions are discussed more fully hereinafter (*infra*, pp. 154–164).

The Relation Between Order No. 27 and Official Order No. 126.—Order No. 27 and Official Order No. 126 represent a joint effort by the national and state governments to solve the problem of milk control for the New York metropolitan milk marketing area. Federal participation in this program is necessary because of the fact that approximately 50 percent of the milk is handled in the current of interstate commerce (R. 261).

Joint public hearings were conducted by an employee of the Department of Agriculture who was designated by the Secretary of Agriculture and by the Commissioner of Agriculture and Markets to conduct such hearings (R. 251). Upon the evidence introduced at the said hearings the Secretary and the Commissioner of Agriculture and Markets issued Order No. 27 and Official Order No. 126, respectively (R. 251, 252). The two orders are identical in their terms except that the definition of handler in Order No. 27 is limited to persons handling milk "which handling is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce."

While the Secretary and the Commissioner have issued separate orders the two operate exactly as though one joint order had been issued. The same Market Administrator has been appointed by the Secretary and by the Commissioner to administer both orders. Only one market-wide pool of milk

is established. The two orders are intended to be complementary and every handler supplying milk to the marketing area must of necessity be subject to one order or the other.

IV. The Evidence

Prior to the trial, the appellant, the intervening plaintiff, Holton V. Noyes, appellant in Cause No. 826, and the appellees entered into a "Stipulation of Facts and Evidence" (R. 250), consisting of eighty-five numbered paragraphs with forty-three exhibits. The League and the Bargaining Agency were subsequently permitted to intervene, subject to the aforesaid stipulation (R. 249). The stipulation expressly provided that all parties reserved the right to object to any part thereof on the ground that it was irrelevant or immaterial, but all other grounds of objection were waived (R. 268).

A. Review of the Evidence Introduced by the United States

Appellant introduced in evidence certain designated paragraphs of the aforesaid stipulation (R. 269) which established that Order No. 27 was issued by the Secretary in strict compliance with the terms of the Act; that there was ample evidence before the Secretary supporting all the terms and conditions of the Order and the reasonableness of such terms and conditions; that the appellees are subject to the Act and the Order; that the appellees have violated the Act and the Order; that the Act and the Order constitute a valid exercise by Congress of the power

to regulate interstate commerce; and that appellant is entitled to the relief demanded in its complaints. The essential facts established by the evidence introduced by appellant are as follows:

Pursuant to the provisions of Sections 8b and 8c of the Act, the Secretary gave notice of public hearings on a proposed marketing agreement and a proposed order regulating the handling of milk in the marketing area, which includes the City of New York and the counties of Nassau, Suffolk, and Westchester, all in the State of New York. The Commissioner of Agriculture and Markets of the State of New York (hereinafter called the "Commissioner"), pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, gave notice of public hearings to be held at the same times and places on an order substantially identical with the aforesaid order (R. 250).

Pursuant to the terms of the notices, joint public hearings were conducted by Glen J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary and by the Commissioner to conduct such hearings. In accordance with the terms of the notices, these hearings were held at Albany, Malone, Syracuse, Elmira, and New York, New York, during the months of May and June, 1938. All interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed order. The hearings were attended by producers, representatives of producers, handlers, and consumers of milk. All

of the defendants knew of the hearings but none of them appeared or was represented at any hearing (R. 251).

The evidence introduced at the hearings consisted of 2,979 pages of oral testimony and 88 exhibits of documentary character (Ex. 3 to stip., R. 269; Tr. 3989–9320).[7] These exhibits in general contain statistics, descriptive information, and economic studies pertaining to the milk industry in the New York Milk Shed. Substantial evidence was introduced at the hearings supporting all the findings of the Secretary and all the terms and conditions contained in Order No. 27 (Pl. fg. 11, R. 171).

At the conclusion of the hearings, briefs were submitted by nineteen parties, including handlers, individuals, and representatives of producers. Thereafter, the Secretary, by notice published in the Federal Register on July 23, 1938, notified all interested persons of his findings on the evidence and of the terms and provisions determined by him to be proper in an order regulating the handling of milk in the marketing area and invited the filing of briefs and written arguments in support of, or in opposition to, such proposed findings and provisions. In response to this notice, briefs were filed by twenty-five parties. After consideration of such briefs, the Secretary, on August 5, 1938, issued Order No. 27, and tentatively approved a marketing agreement, regulating the handling of milk in the marketing area

[7] Wherever the abbreviation Tr. is used in this brief the reference is to the original transcript.

in the manner provided in the Act.[8] The Order contains the terms and conditions authorized by the applicable provisions of the Act and no others, regulates the handling of milk in the same manner as, and applies only to, persons in the respective classes of industrial or commercial activity specified in the Marketing Agreement on which the hearings were held, and contains all the findings which the Secretary is required to make by the applicable provisions of the Act. The Order was published in the Federal Register on August 9, 1938 (R. 251-252, 269).

Pursuant to Section 8c (19) of the Act, the Secretary conducted a referendum of producers to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938, which month he had determined to be a representative period, were engaged in the production of milk for sale in the marketing area. The referendum was held at 308 designated polling places throughout the milkshed, the location of which was such that every producer delivering milk to a plant approved by an authorized health authority for the receiving of milk to be sold in the marketing area had ready access to one or more polling places (Tr. 9321).

Prior to the referendum there were sent to every producer who, on the basis of available information it appeared might be eligible to vote in the referendum: (a) a copy of Order No. 27; (b) a schedule of

[8] On the same date, the Commissioner of Agriculture and Markets duly issued Official Order No. 126 (R. 252, 269).

polling places; (c) a pamphlet prepared by the United States Department of Agriculture, entitled "Questions and Answers on the Federal-State Milk Program for New York"; and (d) a pamphlet prepared by the United States Department of Agriculture entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27." Copies of these documents were sent to approximately 70,000 producers (R. 253, 269). Approximately eighty-seven percent of the votes cast in the referendum were in favor of the proposed Order (R. 253, 269).

After conducting the referendum, the requisite percentage of handlers having failed to sign a marketing agreement, the Secretary, on August 24, 1938, made a determination that the refusal or failure of handlers to sign the Marketing Agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the Order was the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and that the issuance of the Order was approved or favored by at least two-thirds of the producers, who, during the month of May 1938, were engaged in the production of milk for sale in the marketing area. This determination was approved by the President. On August 26, 1938, the Secretary issued an order providing that Order No. 27 should become effective on September 1, 1938. This Order was published in the Federal Register on August 27, 1938 (R. 253-

254, 269). At the time of the trial, Order No. 27 had not been terminated (R. 257, 269).

Approximately one-third of the milk produced for sale in the marketing area is produced in States other than New York. Approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area. A large part of the milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area, is intermingled with the milk which has traveled in the current of interstate commerce. Milk handled by some of the appellees travels through New Jersey on its way to the marketing area and all milk handled by the appellees is sold in the marketing area in competition with milk from other States. Unless the milk produced for sale in the marketing area which does not travel directly in the current of interstate commerce is subject to the same regulation as the milk which travels directly in the current of interstate commerce, the result will be discrimination against milk which travels directly in the current of interstate commerce (R. 261, 269). The handling of milk by all of the appellees is either in the current of interstate commerce or directly burdens, obstructs and affects interstate commerce. Each of the appellees is a handler as defined in Order No. 27, and the appellees are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the amounts set opposite their

respective names in paragraph 62 of the stipulation (R. 265, 269).

B. REVIEW OF THE EVIDENCE INTRODUCED BY THE APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

The only evidence introduced by the appellee, Central New York Co-operative Association, Inc., was offered in support of its claim to an exemption as a producer-distributor from the equalization provisions of the Order. This claim is based upon the provisions of Article VI, Section 1, subsection 3, of the Order, which permit a handler, in computing his net pool obligation, to "Subtract pro rata out of each class the quantity of milk received from the handler's own farm." A cooperative association is a handler within the meaning of Article I, Section 1 of the Order, and is subject to the equalization provisions of the Order.

Appellee contends that it owns the farms of its members within the meaning of Article VI, Section 1 of the Order. The evidence establishes, however, that the appellee, Central New York Co-operative Association, Inc., owns no farms but markets the milk produced by members upon their own farms (R. 265, 269). The milk of its members is received at four country receiving plants and is shipped from such plants to a depot in New York City which it leases. The milk is then distributed and sold in the New York metropolitan area to retail stores and consumers through Hegeman Farms Corporation, Hamilton Milk & Cream Co., Inc., and Cato Milk Com-

pany, Inc., all wholly owned subsidiaries of said appellee. Central New York Co-operative Association, Inc., also markets the milk of approximately seventy-five producers who are not members of, and do not have any written contracts with, Central New York Co-operative Association, Inc. The milk of such producers is marketed and the proceeds thereof remitted to them in the same manner as though such producers were members of the Central New York Co-operative Association, Inc. (R. 265–267, 274). The evidence establishes that the relationship between this appellee and its members is no different from the relationship between any other cooperative such as the League, and its members.

Central New York Co-operative Association, Inc., is holding in its treasury a sum in excess of $5,000, which represents the difference between the aggregate distribution to its members for the month of September 1938 at the uniform price announced by the Market Administrator and the total amount available at that time for distribution, and which would otherwise have been distributed to its producers (R. 267, 274).

REVIEW OF THE EVIDENCE INTRODUCED BY THE OTHER APPELLEES

The appellees' pleadings nowhere alleged, and the appellees offered no evidence to prove, that the action of the Secretary in issuing Order No. 27 was not justified by existing economic conditions; that Order No. 27 was not issued in strict accordance with the

Act; or that Order No. 27 contains any provisions not authorized by the Act; or that there was not ample evidence before the Secretary to support all the terms and conditions of Order No. 27 and the reasonableness of such terms and conditions.

The trial was devoted almost entirely to the introduction by appellees other than the appellee Central New York Co-operative Association, Inc., over objections of appellant, of evidence apparently intended to support the affirmative defenses which appellant had moved to strike. While it is difficult either to summarize these affirmative defenses or to state accurately what the evidence introduced by appellees was intended to prove, appellees were apparently attempting to establish that Order No. 27 and Official Order No. 126 were submitted by the Bargaining Agency to the Secretary and to the Commissioner, respectively, as part of a conspiracy entered into between the Bargaining Agency, the League, the Borden Company and the Sheffield Company for the purpose of securing a monopoly in the distribution of fluid milk in the marketing area; that, as part of such conspiracy, the promulgation and adoption of both Orders were brought about by fraudulent misrepresentation; that the proponents of the Orders caused to be inserted therein various provisions which discriminate in favor of cooperatives and large handlers; and that the Bargaining Agency coerced handlers into signing marketing agreements and complying with the Orders.

To support these contentions, appellees introduced evidence showing that the League sold, either in its own wholesale business or to other distributors, approximately 34% of the fluid milk sold in the marketing area during the months of September, October, and November 1938 (R. 262, 273); that the League sells milk to the Borden Company, and that the Borden Company and the Sheffield Company are the largest handlers in the marketing area (R. 261, 262, 273).

It was conceded by appellant that the League actively sponsored and supported the passage of the Rogers-Allen Law (New York, Laws of 1937, Chapter 383) (R. 374) and that the Bargaining Agency submitted to the Secretary and to the Commissioner the proposed Orders on which hearings were held (R. 263, 273). The League and the Sheffield Producers' Cooperative are both members of the Bargaining Agency (R. 263). One of the attorneys for the League drew the first draft of the proposed Order and submitted it to a lawyers' committee consisting of four members, one of whom was attorney for the League, and one of whom was attorney for the Sheffield Producers' Cooperative (R. 374), but there is no evidence that these two cooperatives, or either of them, dominated the affairs of the Bargaining Agency.

There is no question but that both the Bargaining Agency and the League were active in bringing about the adoption of Order No. 27, but there is no evidence that in so doing they were influenced by any con-

sideration other than the belief that the Order would serve the best interests of producers. The Sheffield Company, one of the alleged conspirators, actively opposed the Order and filed briefs with the Secretary in opposition to the Order (Ex. 23E to stip., R. 274, 535; Ex. 3 to stip., R. 269, Tr. 8783; Ex. 27 to stip., R. ~~269~~ 274, Tr. 9419).

Through their respective newspapers, the Milk Producers' Market News and the Dairymen's League News, the Bargaining Agency and the League urged producers to vote in favor of the Order (Exs. 23–23H to stip., R. 274, 511–548; Exs. 24–24J to stip., R. 274, 549–594), and radio speeches urging the adoption of the Order were made by representatives of the Bargaining Agency (Exs. 23I–23P to stip., R. 274, Tr. 9394–9414).

It is contended by appellees that the explanations of the Order in these newspapers and in the radio speeches are fraudulent and misleading. Appellees also contend that the pamphlet entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27" (Ex. 9 to stip., R. 269, 436), which was issued by the Department of Agriculture and mailed to all producers, is false and misleading.

The proposed Order received widespread publicity. The full text of the Order was published in the Dairymen's League News (Ex. 24E to stip., R. 274, 574), and the Dairy Farmers' Union (Ex. 27 to stip., R. 274, Tr. 9420). The latter paper violently opposed the Order (Ex. 27 to stip., R. 274, Tr. 9415–

9422). Pamphlets in opposition to the Order were passed out at the various hearings (Ex. 28 to stip., R. 274, 637–644). Copies of the Order were mailed to all producers (R. 253, 269), and there was every opportunity for producers to become familiar with the scheme embodied in the Order. Furthermore, the producers in the New York milkshed had long been familiar with the principles upon which the Order was based. Classified price and equalization plans for their own members had been employed by the League (Ex. 3 to stip., R. 269, Tr. 6387) and the Sheffield Producers' Cooperative (Dfdt's. Ex. 68, R. 377, 730) for years, and a classified-price plan similar to Order No. 27 had been in effect in the State of New York under state milk control (Ex. 3 to stip., R. 269, Tr. 7515). Appellees did not produce a single witness at the trial to testify that he had been mislead by the publicity which the Order had received.

The pamphlet issued by the Department of Agriculture states that the program is designed to:

> (1) Establish uniform prices for milk sold by producers to handlers in the metropolitan market;
>
> (2) Assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk is sold or the use made of the milk by the individual handler;
>
> (3) Assure each producer a fair share of the fluid milk market; and

> (4) Provide for the control of surplus milk supplies so that the burden is borne fairly by all producers interested in the metropolitan market, and enable the use of surplus so that it will bring the highest return to producers.

Appellees now contend that these statements are false and misleading because the pamphlet takes for granted the fact that producers organized as a cooperative association are permitted to continue to do business as a cooperative association; and does not explain that such associations are permitted under the Order to continue to return to their members the net proceeds of their milk sold through the Cooperative instead of buying the milk and *paying* them for it at the exact uniform price each month.

The alleged falsity of the above statements rests not upon any facts in evidence or apparent on the face of the order and the pamphlet but upon a legal argument conceived and presented by counsel at the trial in the District Court. Certainly, the failure of those who prepared the explanatory pamphlet issued by the Department of Agriculture to conceive that such an argument might be made and to point out in the pamphlet wherein it is specious cannot be held to amount to misrepresentation or fraud upon the producers; particularly in view of the fact that a copy of Order No. 27 itself accompanied the pamphlet (R. 253, 269) and of the further fact that the order is designed to have, and as shown by the only evidence on the point in the case, will have precisely the

effects described in the pamphlet. (See, *infra*, p. 51.) What has been said with reference to the pamphlet issued by the Department of Agriculture is also true of the statements published by the Bargaining Agency and the League.

Another step in the alleged conspiracy which appellees sought to establish and by which apparently they seek to invalidate the Order was coercion by the Bargaining Agency upon various handlers to compel them after the Order was issued either to sign a marketing agreement or to comply with the terms of the Order under threat of withholding milk from such handlers if they refused to comply. There is some evidence in the record that employees of the Bargaining Agency and E. Manning Gaynor, an employee of the New York State Department of Agriculture and Markets, threatened to withhold milk from Eisenberg Farms Corporation, but the evidence of appellees on this question is vague and unconvincing, and Mr. Gaynor denied on the stand that he had ever participated in any such activity. There is no evidence connecting any representative of the Secretary of Agriculture with such activity.

Appellees attempted to prove that the Act and the Order contain various provisions which discriminate in favor of cooperatives and large handlers and against the appellees. These alleged discriminations are claimed to result from (1) the failure of the Order to require cooperative associations to return the uniform price to producers each month; (2) the failure to regulate milk received at approved plants and sold

outside of the marketing area; (3) the "payments to cooperative associations" and "market service payments" authorized by Sections 5 and 6 of Article VII; (4) Class III–A, IV–A, and IV–B prices which are allegedly so low as to discriminate in favor of handlers who purchase milk in these classes; (5) butter fat differentials which are alleged to be unreasonably high; (6) transportation differentials which are alleged to be unduly favorable to handlers whose plants are located close to the marketing area; and (7) nearby differentials which are paid to producers in certain counties in or close to the marketing area and are also alleged to be discriminatory.

(1) *The failure to require cooperatives to return the uniform price to producers each month.*—Article VII, Section 1, of Order No. 27 expressly exempts cooperative associations from returning to their producers the exact uniform price each month. This exemption is required by Section 8c (5) (F) of the Act, which prohibits the Secretary from inserting in any order, any provision which would prevent a cooperative qualified under the Capper-Volstead Act from blending the net proceeds of all its sales in all markets in all use classifications and "making distribution thereof to its producers in accordance with the contract between the association and its producers" (Appendix A, p. 5).

To support the contention that these provisions of the Act and of the Order result in discrimination against the appellees (only one of which is not a cooperative association), the appellees introduced evi-

nce that the League returned to its producers an
nount less than the uniform price for the months of
ptember (Dfts. Ex. 11, R. 331, 654), October (Dfts.
. 12, R. 331, 655), and November (Dfts. Ex. 13,
332, 677) 1938. From this alone it is argued that
e difference between the sums actually paid and the
iform price constitutes a fund which naturally
d inevitably is used by the League and other large
operatives to undersell proprietary handlers in the
ew York market. Appellees attempted to estab-
h that the League was using this alleged advantage
cut prices in the marketing area, and to take away
e business of the appellee Jetter Dairy Company,
c., and other handlers, but the testimony offered
t only fails to support any such contention, but
irmatively establishes the opposite.

Four storekeepers (Max Bronfeld, R. 288–290;
se Paley, R. 290–293; Herman Lavender, R. 293–
5; Israel Hoch, R. 295) who operate stores in the
rketing area, testified for appellees as to price-
tting by various handlers, but not one of these
tified as to price-cutting by the League or any
ier cooperative subsequent to the effective date of
Order. Three distributors (Alex Eisenberg, R.
)–282; Samuel Miller, R. 317, 319–325; Aaron
benfeld, R. 344, 355–359), testified for appellees
to price-cutting by various handlers, and not one
these testified that the League or any other coop-
tive had engaged in price-cutting. Alex Eisen-
g testified that he had lost no trade to the League
280). Aaron Rubenfeld testified that the League

was not responsible for price-cutting (R. 356). The only witness who testified as to the loss of any business to the League was Samuel Rootstein, Sales Manager for the Triboro Milk & Cream Company. He produced a list of customers lost by the Triboro Milk & Cream Company which listed 57 stops which had been lost to 8 different handlers, in most instances subsequent to the effective date of the Order, but listed not a single stop lost to the League or to any other cooperative (Pl. Ex. G, R. 391, 651).

On direct examination, Rootstein testified that Triboro Milk & Cream Company lost 10 cases of milk to the League and 10 cases to Gold Medal (an independent handler which is not a party to this cause), at 744 Fox Street, on September 4, 1938 (R. 388–389). However, plaintiff's Exhibit G shows that the 10 cases lost to Gold Medal were lost in August 1938, which is before Order No. 27 went into effect.

On cross-examination Rootstein testified that the Lincoln Milk & Cream Company, the business of which was purchased by the League, was delivering 8 cases of milk to 744 Fox St. prior to July 1, 1938, and that between July 1 and September 1, the Triboro Milk & Cream Company captured that business from the Lincoln Milk & Cream Company. There was no evidence that the League regained this business by price-cutting. Rootstein testified that after September 4, 1938, Triboro Milk & Cream Company reduced its price to the 744 Fox St. customer from 9¾¢ to 9¢ in order to retain the balance of the business, but there is no evidence that the loss of business to the League was caused by price-cutting on the part of the League (R. 390, 391).

On redirect examination Rootstein testified that either Jetter Dairy Company or Triboro Milk & Cream Company had lost 6 or 8 cases of milk to the League at 452 E. 146th St., but no details were given with reference to this alleged loss (R. 394).

On the other hand the evidence shows that the League lost 14% of its glass-bottled milk sales in the City of New York between September 1, 1938, and November 25, 1938 (R. 400).

Thus there is no evidence whatever that, if any competitive advantage exists, it has been used by the League or any other cooperative to the detriment of other handlers, but there is positive evidence to the contrary. The evidence also establishes that this provision of the Act, carried out in the Order, does not confer any competitive advantage on the League.

Appellees apparently assume that a cooperative association of producers will not return to its members the net proceeds of the sale of their milk, which constitute the principal regular income to its producers, but will use some part of these proceeds to cut its prices for fluid milk. There is no evidence to support this theory and the only evidence on this point in the record controverts it. An affidavit of E. W. Gaumnitz, Chief of the Dairy Section of the Agricultural Adjustment Administration is in evidence as part of the "Stipulation of Facts and Evidence" (R. 257–259, 272). Most of this affidavit was introduced in evidence by the appellees. In this affidavit, Gaumnitz points out that the primary

interest of a coope ve association is in securing the highest possible return for its members; that the very nature of a cooperative association precludes the possibility that its officials could continue to withhold the money of its members and use that money as a competitive weapon; and that cooperative associations could not continue to exist and perform the services for their members which justify their continued existence if they were required to return the full uniform price each month.

(2) *The failure to regulate milk received at approved plants and sold outside of the marketing area.* A handler operating a plant approved by the appropriate health authority for the receiving of milk to be sold in the marketing area can sell part of the milk received in such plant in the State of New Jersey or in other markets provided the plant is also approved by the health authorities for such markets. Order No. 27 does not attempt to fix the price to be paid producers for fluid milk sold outside of the marketing area.

Some of the larger companies market part of the milk from approved plants in the marketing area, and part of the milk in other markets including New Jersey and the cities in northern New York. The League (Dfts. Ex. 49, R. 360, 674) and the Sheffield Farms Company (Dfts. Ex. 51, R. 360, 676), are among the handlers which sell milk in the marketing area and also sell milk outside the marketing area.

In making payment to producers, a proprietary handler must pay for the milk sold in the marketing

area at the class prices and pays for the fluid milk sold outside the marketing area at the price agreed upon with its producers. However, Article IV, Section 1 of the Order requires any handler which utilizes part of its milk in the various manufacturing classes to allocate a percentage of the milk used in the manufacturing classes to its "out of market sales" of fluid milk. The same thing is true of cooperative associations, except, of course, that a cooperative association will return to its producers the net proceeds of its sales of milk outside of the marketing area instead of arriving by negotiation at a price to be paid for such milk, and will blend the proceeds of such milk with the proceeds of milk sold in the marketing area.

The appellees contend that the sale of milk in the State of New Jersey is highly profitable and that because a handler selling milk both in the market and out of the market may make a profit on the out-of-market sales, it follows naturally and inevitably that the profits so derived will be used for the purpose of underselling other handlers in the marketing area.[9]

[9] The New Jersey Milk Control Board has fixed the price at which milk may be sold to stores in the State of New Jersey at 12¢ in the more populous areas, and 11¢ in the rural sections (R. 372). The price to producers in the State of New Jersey has been fixed at $2.76 at the plant regardless of where the plant is located (R. 372). A large part of the milk sold in the State of New Jersey is shipped in from other States and is unregulated so that milk from New York approved plants must compete not only with milk produced in the State of New Jersey but also with unregulated milk (Pl. fg. 14, R. 177).

The companies which now sell milk from approved plants in both markets, sold milk from approved plants in both markets prior to the effective date of Order No. 27 (Ex. 18 to stip. R. 272, Tr. 9345, Ex. 18a to stip. R. 272, Tr. 9357, Ex. 19 to stip. R. 272, Tr. 9376, Ex. 20 to stip. R. 272, Tr. 9380.) Pressure from producers normally forces the handler to pay for the milk which is shipped to New Jersey, the prevailing competitive price for New York milk (pl. fg. 14, R. 177). With Order No. 27 in effect, this would normally be the uniform price. Prior to the issuance of Order No. 27 the competitive price for milk shipped to the New York market was substantially lower than the uniform price for the months of September, October, and November (Ex. 26a to stip. R. 274, 607; Ex. 24a to stip. R. 274, 557, Deft's Ex. 11, R. 331, 654). If the New Jersey operations have been profitable since Order No. 27 went into effect, it follows that they were more profitable prior to that time, since the only change in conditions has been an increase in the price which the handler must pay for milk sold in the State of New Jersey. If the selling of milk in both markets results in a competitive advantage, the promulgation of Order No. 27 has tended to lessen this advantage.

But there is no evidence that such a competitive advantage exists and there is evidence that the Order does not give rise to any such advantage. One of appellees' witnesses testified that his company withdrew from the New Jersey market as of the effective date of the Order (R. 314). The witness

Rubenfeld testified that he had made a profit on his New Jersey operations, but there is no evidence that any such profits were used to undersell in the New York market. The evidence shows that the League and the companies controlled by Rubenfeld, both of which handlers sell milk in the State of New Jersey, have actually lost business in the marketing area since the effective date of Order No. 27 (R. 343, 400). The only evidence as to cutting of prices in the marketing area by companies doing business in the State of New Jersey is that Breakstone Brothers, Inc., a subsidiary of Sheffield, has been cutting prices (R. 296). The Sheffield Farms Company opposed the issuance of Order No. 27 (~~R. 170~~ Supp. p. 44), and mathematical computations from Defendants' Exhibits Nos. 39 (R. 359, 669), 40 (R. 359, 670), 41 (R. 359, 670), and 43 (R. 359, 673) will show that the Sheffield Farms Company has been required under the Order to pay to the Producer Settlement Fund, sums which have averaged substantially in excess of $100,000 per month.

(3) *Payments to cooperatives and market service payments authorized by Sections 5 and 6 of Article VII of the Order.*—The payments to cooperatives and the market service payments authorized by Sections 5 and 6 of Article VII of Order No. 27 are asserted by appellees to be discriminatory as against them and other small handlers. To support this claim of discrimination appellees introduced only evidence showing the amounts of market service payments claimed and received by certain handlers, including the

League (Dfts. Ex. 46, R. 360, 674), the Sheffield Company (Dfts. Ex. 77, R. 395, 740), The Borden Company (Dfts. Ex. 77, R. 345, 740), and the Middletown Milk & Cream Company (Dfts. Ex. 29, R. 348, Tr. 9635) and the amounts received by the League and (other cooperatives) pursuant to Section 5 of Article VII (Dfts. Ex. 46, R. 360, 674, Dfts. Ex. 39, R. 359, 670; Dfts. Ex. 41, R. 359, 672).

No evidence was introduced showing or purporting to show that the handlers receiving these payments do not perform valuable services for the market as a whole; that the compensation for the services performed is excessive; or that the actual cost of performing such services is less than the amount of the payments.

It is stipulated that the average cost of handling milk at country receiving stations varies from 15¢ to 30¢ per cwt. (R. 401). The 23¢ handling charge which is allowed by Section 6 of Article VII is the average between the high and the low figures. It is also stipulated that the mileage allowances represent approximately the average cost of transporting milk by truck (R. 741). One of the appellees' witnesses (Rubenfeld, R. 358), testified that in the absence of such market service payments his company would be unable to accept any milk from producers over and above the amount necessary to meet its own needs. Appellees did not contend that there was not ample evidence before the Secretary to justify these payments. A summary of the evidence before the Secretary is contained in paragraphs 13 (D) and 13 (E)

f plaintiff's proposed findings of fact (R. 175–177).[10]
Appellees apparently assume that it is necessary
or a handler to have manufacturing facilities in
rder to qualify for market service payments, but
uch is not the case. Section 6 of Article VII is
esigned primarily to enable the small cooperative or
he small proprietary handler to accept all the milk
f all producers and to dispose of the surplus over and
bove its fluid milk requirements by transferring it
o some plant equipped for manufacture. This pro-
ision is available to the appellees at any time and the
ecord establishes that it has been freely used by
mall handlers as well as large to enable them to
ispose of their surplus milk (Gaynor, R. 371;
liller, R. 316, 317; All, R. 306).

(4) *Class III–A, IV–A, and IV–B prices.*—To
upport their claim that the Class III–A, IV–A, and
nd IV–B prices are so low as to result in discrimina-
on in favor of handlers which engage in manu-
acturing operations, appellees produced two wit-
esses; one of whom operated a butter factory
Barber, R. 295), and the other of whom operated a
heese factory (Mills, R. 301).

[10] The District Court found that there was substantial
idence before the Secretary to justify all the terms and
nditions of Order No. 27 (R. 171), but refused to find the
cts to be as stated in paragraphs 13 (D) and 13 (E) with
e cryptic notation "Refused as not relating to demon-
able facts." (R. 175, 177.) It is assumed that the District
urt did not mean to refuse to find that there was evidence
fore the Secretary as stated in these paragraphs, but meant
at in its opinion the statements of fact therein contained
not be demonstrated to be correct.

The witness Barber testified that the prices which he had paid for the cream equivalent of 100 pounds of 3.5 milk were *below* the Class IV–A prices fixed in the Order (R. 296; Dfdts. Ex. 39, 40, 41, R. 359, 669-672). On cross examination it developed that his company has a preferred up-state market near his plant and that it manufactures butter on a year-round basis and not merely during the flush season (R. 297). The cost of manufacturing butter is higher when the operations are seasonal and intermittent (R. 325). The skimmed milk was proved to have very little value (Miller, R. 312). The witness Bullock testified that he had sold skimmed milk during the short season for 25¢ per cwt. (R. 363, 364) but this, of course, does not establish that skimmed milk has any substantial value during the flush season, which is the period during which butter is made as a surplus operation.

The witness Mills testified that he paid about 20¢ per cwt. more than the Class IV–B price for milk to be manufactured into cheese, during the months of September and October 1938 (R. 302). This however, was during the short season at which time there would normally be a shortage of milk available for the manufacture of cheese.

Appellees have never contended that there was not ample evidence before the Secretary to support the reasonableness of these class prices. A summary of the evidence introduced at the hearing before the Secretary is contained in paragraph 13 (A) of appellant's proposed findings of fact (R. 173). This

proposed finding was granted by the District Court.

(5) *Butter fat differentials.*—The reasonableness of the butter fat differentials is not attacked in the pleadings and the contention that these differentials are too high was first heard during the trial. It was stipulated that there is only one grade of Grade B milk irrespective of butterfat content (R. 401), but it is neither asserted nor proved that the butterfat content is not one of the factors affecting the price at which fluid milk can be sold. The witness All testified that a New York City distributor had declined to accept the milk of the Worcester County Cooperative because of the high butterfat content (R. 306) but this witness also testified that he had been able to divert the milk to a manufacturing plant and account for it to the pool at the Class IV–A price (R. 309).

Appellees have never contended that there was not ample evidence to support the reasonableness of the butter fat differentials. A summary of the evidence introduced at the hearing before the Secretary is contained in paragraph 13 (C) of appellant's proposed findings of fact (R. 175). This proposed finding was granted by the District Court.

(6) *Transportation differentials.*—It was stipulated that the transportation differentials are based upon the standard tank-car rate approved by the Interstate Commerce Commission, which rates are 70% of the standard rates for the shipment of milk in less than carload lots. Truck competitive rates have been established at certain points which are somewhat

lower than the approved tank-car rates for these points. It was also stipulated that the trucking allowances in Section 6 of Article VII represent the approximate cost of transporting milk by tank truck (Dfdt.'s Ex 78, R. 395, 741). There are no established truck rates (R. 376).

Appellees have never contended that there was not ample evidence before the Secretary to support the reasonableness of the transportation differentials. A summary of that evidence is contained in paragraph 13 (B) of appellant's proposed findings of fact (R. 175). This proposed finding was granted by the District Court.

(7) *Nearby differentials.*—No evidence was introduced by appellees in support of their contention that the payment of special differentials to producers in 18 counties near the marketing area constitutes a discrimination against appellees. Appellees failed to prove that the operations of the alleged conspirators are such that the alleged competitive advantages resulting from the nearby differentials (and also transportation and butter fat differentials) work in their favor. There was ample evidence before the Secretary to justify the reasonableness of the nearby differentials. The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by nonproductive mountainous territory (Ex. 9 to stip. R. ~~260~~ 274, 582). The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an

almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential (Ex. 3 to stip. R. 269, Tr. 7324, 7405, 9437).

The theory of appellees' case, as pointed out above, appears to be that the alleged discriminatory provisions of Order No. 27 make it possible for certain large cooperative and proprietary handlers to undersell other distributors in the market with the purpose and effect of securing a monopoly in the distribution of fluid milk. The evidence wholly failed to establish that the provisions of the Order have any discriminatory effect, and likewise failed to establish that the alleged conspirators have been using any of these alleged advantages to cut prices in the fluid market. Appellees introduced evidence to show that the reasonable cost of a quart of milk delivered to a store in New York City by a handler who pays producers the Class I price, is from 9¢ to 9¾¢, that on September 1, 1938, handlers generally raised prices from the prevailing low levels to 9¾¢ per quart but that subsequently prices broke in some sections of New York City to from 8¢ to 9¢. The evidence shows, however, that the price-cutting was started and has been continued almost exclusively by the so-called independents, and that the only one of the larger companies which has engaged in price-cutting has been the Sheffield Farms Company through its subsidiary, Breakstone Brothers, Inc. (R. 280, 282, 288–295, Pl. Ex. G., R. 391, 651). As pointed out *supra*,

at p. 55, Sheffield Farms Company opposed the Order, and its operations are such that it has been forced to pay substantial amounts into the Producer Settlement Fund.

Two of appellees' witnesses testified that, in their opinion, the break-down in prices in the marketing area subsequent to September 1, 1938, resulted primarily from the willingness of some of the independents to cut prices on the chance that the District Court would refuse to enforce Order No. 27, and that thus they could avoid paying the prices fixed in the Order (R. 324, 356).

In view of the failure of appellees to support their affirmative defenses, appellant rested at the conclusion of appellees' case without offering any evidence in rebuttal.

V. The Findings of Fact Made and Adopted by the Court

At the conclusion of the trial, both sides submitted proposed findings of fact. The Court noted its rulings on the proposed findings on the margins thereof (R. 167–232). The proposed findings of fact submitted by the appellee Central New York Co-operative Association, Inc., were all granted without objection and are not included in the record. Subsequently, the Court prepared findings of facts and conclusions of law in which it incorporated such of the findings proposed by the appellees Jetter Dairy Company, Inc.; Rock-Royal Co-operative, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc., as were granted (paragraphs 1–101,

R. 127–161), and such of the proposed findings submitted by the appellee, Central New York Co-operative Association, Inc., as did not duplicate proposed findings submitted by the other appellees (paragraphs 102–108, R. 161–162), and incorporated by reference, the paragraphs of appellant's proposed findings of fact which were granted (paragraph 109, R. 162).

A. REVIEW OF THE FINDINGS OF FACT SUBMITTED BY APPELLANT

The proposed findings of fact submitted by appellant outline the steps taken by the Secretary in promulgating Order No. 27 and show that the Order was issued in strict compliance with the applicable provisions of the Act. Substantially all of the proposed findings relative to the issuance of the Order were granted by the Court except paragraph No. 8 (R. 169), which the Court said was substantially the same as paragraph No. 11 of appellee's proposed findings, and paragraph No. 9, which the Court said was the same as appellee's paragraph No. 12. Paragraph No. 8 of appellant's proposed findings is identical with appellees' proposed finding No. 11, which was granted, except for the phrase "said Order containing the terms and conditions *held by the Secretary to be* authorized by the applicable provisions of the Act and no others." Appellant's proposed finding No. 8 eliminates the italicized words. It is nowhere alleged in the pleadings and, we submit, there is no evidence in the record that Order No. 27 contains any unauthorized terms and conditions.

This question is briefed more fully *infra* at pp. 158 to 164. Similarly appellant's proposed finding No. 9 is identical with appellees' proposed finding No. 12 which was granted, except for the inclusion of the phrase "held by the Commissioner." It is nowhere alleged in the pleadings and there is no evidence in the record that Official Order No. 126 contains any unauthorized terms or conditions.

Appellant's proposed finding No. 11 states that "substantial evidence supporting all of the findings of the Secretary and the terms and conditions contained in Order No. 27 and the findings of the Commissioner and the terms and conditions contained in Official Order No. 126 was introduced at the said hearing." This proposed finding was granted (R. 171).

Appellant's proposed finding No. 12 (consisting of subsections A to G), contains a summary of the evidence before the Secretary showing that marketing conditions for milk flowing into the New York Metropolitan Area were so disrupted as to result in impairment of the purchasing power of such milk and that the issuance of the Order would tend to effectuate the declared policy of the Act. The District Court noted on the margin "Granted that there was such evidence but these are not all found as facts" (R. 171). However, in ruling on paragraph 12 (E) the Court refused to find that there was evidence before the Secretary that the terms and provisions of Order No. 27 would tend to effectuate an equitable distribution of the burden of surplus (R. 172). In view of the Court's finding that there was evidence

before the Secretary to support all the terms and conditions of the Order and the granting of substantially all of appellant's proposed findings Nos. 12 and 13, the refusal to find that there was evidence that the terms and provisions of Order No. 27 would tend to effectuate the distribution of the burden of surplus must have been intended by the District Court as a finding that, while there was evidence to support the various provisions of the Order, the evidence would not have convinced the Court that the terms and provisions of the Order would tend to effectuate such a distribution.

Paragraph No. 13 (consisting of subsections A to F), of appellant's proposed findings, contains a summary of the evidence before the Secretary with reference to the terms and conditions of the Order which are challenged by appellees. The District Court noted on the margin: "granted that there was some evidence, but these are not found as facts" (R. 173).

The Court, however, made the following notation on the margin with reference to subparagraph D, "Payments to Co-operative," "Refused as not relating to demonstrable facts" (R. 175). With reference to subparagraph E "Market Service Payments" the Court made the notation, "Refused for same Reason" (R. 176).

The exact meaning to be attached to the District Court's qualified refusal to find the facts as stated in subparagraphs 13 (D) and 13 (E) is not entirely clear, but it would appear that the Court did not intend to refuse to find that evidence, as outlined in

these paragraphs, was before the Secretary, but intended rather to hold that the Secretary should have disregarded such evidence because the Court did not believe that the facts stated therein could be demonstrated to be true. In other words, it seems that the District Court was not finding that there was not evidence before the Secretary, but was passing upon the credibility and weight of such evidence.

Paragraphs 19, 20, and 22, of appellant's proposed findings of fact were granted. These findings outline the steps taken by the Secretary to ascertain which cooperative associations were qualified to vote, and establish that none of the appellees ever attempted to qualify to vote for their producers (R. 179–180).

Paragraph 14 of appellant's proposed findings demonstrates that the failure of Order No. 27 to regulate milk sold outside of the marketing area does not confer any advantage on handlers who also sell fluid milk in the State of New Jersey. The District Court granted this finding except that it refused to find that the prevailing market prices prior to the adoption of Order No. 27 were substantially lower than the uniform prices in effect under the Order (R. 177). This finding should have been granted in its entirety. See *supra* p. 54.

Paragraphs 27, 28, 29, and 30 of appellant's proposed findings of fact, which establish that Section 8c (5) (F) of the Act confers no competitive advantages upon cooperatives, were nearly all refused by the District Court (R. 181–183) although they were taken almost verbatim from the Stipulation of Facts

and Evidence (R. 257–260, 272). While it is true that some of the statements therein represent the opinions of Dr. Gaumnitz, Dr. Gaumnitz was qualified as an expert witness (R. 257), and no evidence was introduced to refute his statements. The complete failure of appellees to establish that any cooperative had initiated or engaged in price cutting in the Metropolitan marketing area also sustains these proposed findings. See *supra* pp. 49–51.

The District Court granted so much of paragraph 31 of appellant's proposed findings as states that the League had lost part of its wholesale business since September 1, 1938, but refused to find that the League did not initiate price cutting in the marketing area and has not engaged in price cutting but that price cutting was initiated by some of the so-called independents and has been engaged in most actively by such independents (R. 183). On the evidence before the Court, this finding should have been granted in its entirety, *supra* pp. 49–51.

Paragraphs 32, 33, and 34 of appellant's proposed findings of fact were granted (R. 183–184). These findings establish that all of the milk which is produced for sale in the marketing area either moves in the current of interstate commerce or burdens, obstructs, or affects interstate commerce; and that the appellees are all handlers as defined in Order No. 27 and are indebted to the Market Administrator in the sums set opposite their respective names in paragraph 34.

Paragraph 35 of appellant's proposed findings was granted (R. 184). This finding is that the appellee, Central New York Co-operative Association, Inc., does not own any farms; that it handles milk produced by its members upon their own farms, and also the milk of approximately seventy-five producers who are not members of, and have no written contracts with, this appellee.

The District Court refused to find, as requested in paragraphs 42–46, inclusive (R. 185–186) of appellant's proposed findings, that the Bargaining Agency did not enter upon a program to secure for any of its members an unlawful competitive advantage over the appellee Jetter Dairy Company, Inc., and others, that it did not enter upon a program to establish a monopoly in its members or companies dealing with its members; that neither the Bargaining Agency nor the League entered upon a program to confiscate the property rights of the appellee, Jetter Dairy Company, Inc., and that the Bargaining Agency was not at any time dominated or controlled by the League, or the Sheffield Cooperative. If these issues have any proper place in the case, the burden of proof with reference to them was on the appellees, and the appellees failed to sustain this burden. On the evidence before the Court, these proposed findings should have been granted.

The District Court refused to find the facts as stated in paragraphs 47, 48, and 49 of appellant's proposed findings with reference to the price returned

by the League to its producers during the months of September, October, and November, 1938 (R. 186). On the evidence before the Court, these findings should have been granted (Dfts. Ex. 11, R. 331, 654; Dfts. Ex. 12, R. 331, 655; Dfts. Ex. [illegible], R. ~~332, 665~~ 364 477).

The District Court refused to find, as requested in paragraphs 51 and 52 of appellant's proposed findings (R. 187), that the League has not achieved nor attempted to achieve a monopoly in the handling of milk in the marketing area during the period since the Orders went into effect, and that the Orders do not tend to create a monopoly. If these issues have any proper place in the case, the burden of proof with reference to them was on the appellees, and the appellees failed to sustain this burden. On the evidence before the Court, these proposed findings should have been granted.

The District Court found, as requested in paragraph 55 of appellant's proposed findings, that E. M. Harmon, the Market Administrator, "at no time coerced or intimidated any handler of milk; nor did he threaten to use or use his influence to cut off any handler's supply of milk in order to induce said handler to sign a marketing agreement or to comply with Order No. 27 or for any other purpose; nor did any person, agency or association, acting under the said E. M. Harmon's direction, or with his advice or consent, threaten, coerce, or intimidate any handler in any manner whatsoever, or for any purpose

connected with the formulation, promulgation, administration, or enforcement of the marketing agreement, or Order No. 27 or otherwise" (R. 187), but refused to find as requested in paragraph 56 of appellant's proposed findings (R. 187) that none of the defendants were in any way threatened, coerced, or intimidated. On the evidence before the Court, this finding should have been granted. If this issue has any proper place in this case, the burden of proof with reference to it was on appellees, and appellees failed to sustain that burden. The only evidence in the case bearing any possible relation to alleged coercion exercised upon the appellees, is the evidence of the witnesses, George Wilson (R. 283), Howard Richmond (R. 286), and Leonard Faulkner (R. 287). George Wilson testified that an employee of the Diarymen's League had asked him "Wouldn't you prefer drawing your milk to the Dairymen's League where you would be sure of getting your check every month," and told him that one of his neighbors had said that the Jetter Dairy Company had kept back a two week's check from him (R. 284).

Howard Richmond testified that employees of the Bargaining Agency assisted in the formation of a cooperative association among the producers delivering milk to one of the plants of the Jetter Dairy Company; that, at the request of someone claiming to be a representative of the Bargaining Agency, he had signed a letter to the Jetter Dairy Company asking that it become a member of the distributors'

Bargaining Agency, and that the alleged representative of the Bargaining Agency had mailed the letter to the Jetter Dairy Company (R. 286).

Leonard Faulkner, a producer who delivers milk to the Jetter Dairy Company, testified that E. Manning Gaynor, an employee of the New York State Department of Agriculture and Markets, told him that if the producers did not get busy and compel Jetter to sign a marketing agreement they "would get a big gypping on September milk" (R. 288). There was no evidence that this alleged conversation was followed by any action and when Gaynor was called to the stand by appellees as their witness, he was not asked about this alleged conversation. It is submitted that this evidence falls far short of establishing that the appellees were threatened, coerced, or intimidated.

B. Review of the Findings of Fact Submitted by Appellees

The findings of fact proposed by the appellee, Central New York Co-operative Association, Inc., were all taken from the "Stipulation of Facts and Evidence" and were adopted by the District Court without objection. The other appellees presented to the Court proposed findings of fact consisting of 104 numbered paragraphs. Appellant objected to Paragraphs 7; 11 to 18, inclusive; 21 to 27, inclusive; 36 to 62, inclusive; 64 to 79, inclusive; and 81 to 104, inclusive; and filed with the District Court a detailed statement of the basis of its objections to each of

these proposed findings (R. 233–245). Over appellant's objection, the District Court, with few modifications, adopted all of these proposed findings with the exception of Paragraphs 7 and 61 (R. 127-161).

In general, appellees' proposed findings either are entirely unsupported by the evidence or are inaccurate and argumentative. Some are simply statements of fragments of the evidence and even include quotations from two issues of the Dairymen's League News, namely the issues of September 6, 1938 (R. 155) and October 11, 1938 (R. 157, 159), which were never offered or received in evidence.

A complete discussion of the proposed findings submitted by appellees which were adopted by the District Court would unduly burden this statement and appellant has, therefore, selected for detailed discussion only Paragraphs 38 to 45, inclusive, of appellee's proposed findings (R. 201–205), which summarize the purported competitive advantages conferred upon the League by Order No. 27. These were adopted by the District Court as Paragraphs 37 to 44 of its findings of fact (R. 136–139).

In these findings the amazing conclusion is reached that, under the Order, the League received competitive advantages ranging from $2.21 per cwt. in November to $3.30 per cwt. in September on all the milk distributed by it in its own wholesale business.

The conclusion of the District Court as to the competitive advantage enjoyed by the League is

based not upon facts disclosed by the record or otherwise evident but upon at least six separate erroneous assumptions. These assumptions may be analyzed as follows:

> (1) The assumption that $2.76 per cwt. is the Reasonable Value of Milk Delivered to an Approved Plant in the 201–210 Mile Zone for Sale in the State of New Jersey in Fluid Form.

The State of New Jersey Milk Control Board has fixed a price of $2.76 per cwt. to be paid to producers for milk delivered to an approved plant in the State of New Jersey (R. 372). The District Court assumed and found without any proof that this is the reasonable value of milk delivered to a plant outside of the State of New Jersey in the 201–210 mile zone for sale in the State of New Jersey. There is no basis for this assumption. The New Jersey price is not fixed at the 201–210 mile zone with appropriate transportation differentials, but is fixed at the plant to which milk is delivered in the State of New Jersey, which may be a country plant or may be located in the northern New Jersey marketing area. To compare this price with the price paid in the 201–210 mile zone, plainly it would be necessary to deduct appropriate transportation differentials. But even were due allowance made for transportation, the price fixed by the New Jersey Milk Control Board is not the proper standard by which to judge the value of milk purchased in other States for sale

in the State of New Jersey. The New Jersey price applies to only a small part of the milk which supplies the New Jersey market. Unpriced Class I milk (milk received at a plant approved for the New York market, but sold outside of the New York market) which is sold in the New Jersey market comes into direct competition with milk which is produced outside the State of New Jersey at plants which are not approved for the New York marketing area (Ex. 18 to stip. R. 272, Tr. 9345; Ex. 20 to stip. R. 272, Tr. 9380). The market value for unpriced Class I milk which is sold in the New Jersey market is determined by the prices paid for such unapproved milk rather than by the prices paid to producers in the State of New Jersey. There is no evidence in the record as to the value of, or the prices paid for, milk produced outside of the State of New Jersey for sale within the State of New Jersey at plants which are not approved for the New York marketing area.

(2) The assumption that, in Return for the Payments to Co-operative Associations Authorized by Section 5 of Article VII, the Co-operative Associations which received such Payments Perform no Service Involving either Expense to Themselves or Value to the Market.

There is no evidence in the record to support this premise. The only evidence introduced by appellees which in any way relates to co-operative payments is

the evidence as to the sums actually paid to the different co-operatives pursuant to Section 5 of Article VII of the Order. There was ample evidence before the Secretary to support the reasonableness of these payments (Ex. 3 to stip. R. 269, Tr. 5597). This evidence is summarized in Paragraph 13 (D) of appellant's proposed findings of fact (R. 175). These payments are only compensation for services performed by co-operatives in keeping surplus facilities available and in operating in such a manner as to insure the highest possible return to producers. See *infra*, pp. 155–164. The cooperative payments represent compensation for services rendered and expenses incurred for the benefit of the market as a whole. In the absence of any evidence that such services were not rendered or that these payments are not reasonable compensation for such services there is no basis for the bald assumption that these payments represent a competitive advantage to the League.

(3) The assumption that the Market Service Payments Authorized by Section 6 of Article VII of the Order are mere Gratuities, that the League Incurred no Expense in Earning the Market Service Payments which it received, and that the Services Performed by the League in return for these Payments are of no value to the Market.

As in the case of the co-operative payments no evidence was introduced by appellees tending in any way to impeach the reasonableness of these payments. Their reasonableness was amply supported

by the evidence before the Secretary (Tr. 5174). This evidence is summarized in Paragraph 13 (E) of appellant's proposed findings of fact (R. 176).

The evidence clearly establishes that a handler who diverts his surplus milk to a manufacturing plant incurs expenses substantially equal to the market service payments received (R. 401, Dft. Ex. 78, R. 395, 741) and that a handler could not without loss accept surplus milk from producers at a plant lacking manufacturing facilities unless reimbursed for these expenses (R. 355, 358). See *infra*, p. 163. Since the League has actually incurred this expense in disposing of surplus milk and thereby performing a definite service for the market, there is no basis for any finding that the market service payments received by it constitute a competitive advantage.

(4) The assumption that the "base price" paid by the League in the 201–210 mile zone is a Figure Comparable to the Uniform Price.

There is probably not sufficient evidence in the record to explain the meaning of "base price" but it is clear from Defendants' Exhibits Nos. 11 (R. 331, 654), 12 (R. 331, 655), and 54 (R. ~~352~~ 368, 677) that in accounting to its producers, the League employs differentials over and above those required by Order No. 27. The total of such differentials must, of course, be deducted in computing the "base price." The average amount actually returned by the League to its producers in the 201–210 mile zone is the only figure which would make a fair basis of comparison. The average amounts returned by the League at the

01–210 mile zone after deducting all service costs ere $1.83, $1.87 and $2.07, for the months of Sepember, October, and November, 1938, respectively, s compared with "base prices" of $1.75, $1.81 and 2.01, respectively, and uniform prices of $1.87, $1.91, nd $2.10, respectively.

(5) The assumption that the League accounted to its producers for the Class I milk sold outside of the marketing area at only the "base price" paid by it in the 201–210 mile zone.

Paragraph 2 of Section 1 of Article IV specifically rovides that when a handler sells Class I milk outide of the marketing area [11] a portion of his milk, n the manufacturing classes is likewise unpriced. he District Court ignored this provision of the rder and based its findings on the assumption that ll of the surplus milk handled at a plant which is pproved for both the New York and the New ersey markets is accounted for to the pool and ccordingly that the Class I milk which is sold in he State of New Jersey carries with it none of the urden of the surplus. That this assumption is ntrue is evident from the terms of the Order. ursuant to Article IV of the Order a handler selling ilk in both markets is allowed to account to the ool for only a designated percentage of the milk hich he handles in the lower manufacturing classes. he blended price paid by a handler who sells milk

[11] Class I milk sold outside of the marketing area is not bject to the provisions of the Order. See *supra*, pp. 24–25.

in both markets represents not a blend between the uniform price and the price paid for the Class I milk sold outside of the marketing area but a blend between the uniform price and prices paid for Class I milk sold outside the marketing area, Class II-A milk sold outside the marketing area, and milk in the manufacturing classes which under Article IV is required to be allocated to the Class I milk sold outside of the marketing area and for which the handler gets no equalization credit from the pool.

The operation of this section of the Order is illustrated by the report of the Middletown Milk and Cream Co. for the month of November 1938, covering its Slate Hill Plant (Defts. Ex. 27 (A) R. 348, 661).[12] This plant is located at the 81–90 mile zone in Orange County, so that the cost to the handler of Class I milk delivered to this plant and shipped to the marketing area is $2.45, the Class I price, plus 8¢ transportation differential, plus 5¢ location differential, or a total of $2.58 per cwt. An analysis of this report will show that the cost to this handler for Class I milk sold outside of the marketing area was $2.62 per cwt. Columns 10, 12, 13, and 14 of Dfts. Ex. 27A show 421,627 pounds of unpriced Class I milk (milk sold outside the marketing area) and 84,939 pounds of unpriced Class II-A milk. Columns 12, 13, and 14 further show that of 243,184 pounds of Class III-D milk handled, the handler

[12] There are no reports of the League in evidence but Defendants' Exhibit No. 13 shows that the League occupies a similar position.

ld claim credit in the pool for only 168,762 nds, the part allocated to the market under the der, leaving 74,422 pounds unpriced. Dfts. Ex. (R. 348, 666) shows that the Middletown Milk l Cream Company paid its producers for all milk eived at the plant at the rate of $2.38 per cwt. for k containing 3.5% butterfat at the Slate Hill nt. This was five cents less than the uniform ce plus freight and nearby differentials. In ring the cost to this handler of his Class I un-ced milk, it must be borne in mind that the price d included 74,722 pounds of unpriced Class III–D k on which the class price for the month of vember was only $1.052 (Dfts. Ex. 41, R. 672,), as well as 84,939 pounds of Class II–A milk for ich the class price was only $1.90 per cwt. If the ue of unpriced Class II–A and III–D milk is ired at the class prices, the net cost to this handler his Class I unpriced milk in the 81–90 mile zone s nearly $2.62 per cwt., to which must be added cost of transportation to the New Jersey market. ere is no basis in the record for the Court's assump-n that this price is less than the reasonable value such milk.

(6) The assumption that, through the cumulative effect of these assumed discriminatory advantages under the Order, the League has acquired a large fund which it has used for the purpose of underselling proprietary handlers in the market instead of passing such benefits on to its producers in the form of increased returns.

The fallacy of this premise is two-fold: (1) the court's assumption that such discriminatory advantages under the Order exist, and (2) that any fund so acquired has been used by the League for the purpose of underselling proprietary handlers in the market. As pointed out, *supra*, pp. 48–60, not one of the assumed advantages is shown by the evidence actually to exist, and there is no foundation for the court's finding that such advantages do exist. The court, however, believing that such discriminatory advantages exist, drew the inference that, since the money thus acquired was not passed on to the producers, such money must have been dissipated by price-cutting.

The court, having aggregated its unproved assumptions that competitive advantages claimed to have been created by the Order actually existed, reached the fantastic conclusion that they resulted in total advantage to the League ranging from $3.30 per cwt., or 7¢ per qt., in September, to $2.21 per cwt., or 4⅘¢ per qt., in November.

Had these alleged advantages actually existed and had they all been used by the League to cut prices, as the contention appears to be, it would have meant that the League was selling all its milk in the marketing area at prices which averaged only 2 to 2½¢ per qt. in September and only 4½ to 5¢ per qt. in November. The lowest price at which the League was proved to have sold milk in the marketing area was 9¢ per qt. (R. 292, 391). The League has actually lost a part of its wholesale business in the

marketing area since September 1, 1938 (R. 400). Despite the facts wholly uncontradicted by anything in the record, that the League has not cut prices, and has lost business since the order was in effect by reason of its failure to cut prices, it has still been unable to return the uniform prices to its producers *supra*, p. 76. These facts alone would seem to demonstrate conclusively that the advantages assumed and incorporated in findings by the District Court not only do not in fact exist but on the contrary, that the order falls somewhat short of fully equalizing the burden of the surplus and the cost of performing services for the market heretofore borne by the League and the other cooperatives—that instead of giving the members of the cooperatives an advantage, the order leaves them still bearing more than an equal share of the burdens peculiar to the marketing of milk in the New York area.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant specifies all of the assigned errors set out in its assignment of errors as the assigned errors intended to be urged. These assigned errors are summarized as follows:

The court below erred:

1. In failing and refusing to issue the injunctions and grant the relief prayed in the complaints (Assignments 1 and 2).

2. In failing to find without qualification, change, or omission the facts stated in the proposed findings

of fact submitted by appellants (Assignments 3 and 4).

3. In finding the facts to be as set forth in paragraphs numbered 17, 20 to 26, inclusive, 36 to 59, inclusive, 70 to 77, inclusive, 79 to 97, inclusive, 97a, 100, and 101 of its findings of fact (Assignment 5).

4. In making its conclusions of law (Assignments 6, 7, and 8).

5. In overruling and denying appellant's motions to strike from the answers of the appellees certain affirmative defenses set up therein, and in receiving, over appellant's objection to the relevance thereof, evidence offered by appellees to support such affirmative defenses (Assignments 9, 10, 11, 12, 18, 19, and 20).

6. In holding that the appellees have any legal standing to assert in this proceeding that the provisions of Order No. 27 are discriminatory as to them without having first exhausted the administrative remedy for such grievances provided in Section 8c (15) of the Act (Assignment 13).

7. In holding that the provisions of Section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with, the requirements of the Fifth Amendment to the Constitution of the United States (Assignments 14 and 15).

8. In holding that the provisions of Section 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Section 8, clause 3, of the Constitution of the United States (Assignment 16).

In holding that the provisions of Section 8c (5) of the Act, which permit a cooperative associa- of producers to blend the net proceeds of all s of milk in all markets and to make distribution eof to its producers in accordance with its con- t with such producers, as applied in Order No. unlawfully discriminate against the appellees and ate to take the property of appellees without process of law (Assignments 17, 28, 29, 30, 31, nd 33).

. In holding that the Secretary's determination, oved by the President, made pursuant to Sec- 8c (9) of the Act, that Order No. 27 was approved vored by more than two-thirds of the producers ucing milk for sale in the marketing area, was ective to put Order No. 27 in operation (Assign- ts 21, 22, and 23).

. In holding that the Order unlawfully dis- inates against the appellees and operates to their property without due process of law ignments 24, 25, 26, 27, and 40).

. In holding that the payments out of the Pro- r Settlement Fund to cooperative associations, as ided for in Article VII, Section 5 of Order No. 27, [redacted] (Assignments 34, 35, and 36).

. In holding that the market service payments to lers, provided for in Article VII, Section 6 of r No. 27, are [redacted] (Assignments 37, 38, and 39).

SUMMARY OF THE ARGUMENT

I. THE CONSTITUTIONALITY OF THE ACT

A. The provisions of the Act regulating the handling of milk constitute a valid exercise of the constitutional power of Congress to regulate interstate commerce. It is settled that sales of commodities for transportation in interstate commerce are subject to regulation by Congress. The power of Congress to regulate the prices of commodities moving in interstate commerce has never been directly passed on by this Court, but this power is evident from the federal power to regulate other terms of contracts in or directly affecting interstate commerce, and to regulate activities which affect prices in interstate commerce for the purpose of regulating such prices, and from the power of the states to fix prices which, in the field of the state police power is commensurate with the Federal power in the field of interstate commerce.

The equalization provisions of the Act are necessary to make effective the price-fixing provisions. Moreover, maldistribution of the burden of surplus milk among producers results in the disruption of the flow of milk in interstate commerce. Price fixing alone is not sufficient to cure this condition. Price fixing and market-wide equalization are both necessary in order to distribute the burden of the surplus equally among all producers. The provisions of the Act are reasonably designed to effect this end. The power to impose a regulation includes the incidental power to levy a charge on handlers in order to defray the costs of administration (see pp. 92–108 *infra*).

B. The Act does not involve any unconstitutional delegation of power to the Secretary of Agriculture. Congress has defined the policy and established the standards to guide the execution of that policy through each of the steps required in initiating and administering an order. The facts to be found and applied in making the determinations required by the Act are all ascertainable from information available to the Secretary. Their ascertainment and application are guided in each instance by a statutory designation of the objectives which Congress seeks to obtain, the factors it intends the Secretary to consider, and the character of the action to be taken on the facts found. These specifications are found in the Act in detail as precise as is consistent with the effective administration of a plan for regulating complex economic relationships.

The provisions of the Act authorizing the Secretary to conduct a referendum among producers does not constitute an unlawful delegation of legislative power to the producers. The producers have no power to impose an order. The determination of the Secretary as to producer approval of an order is merely a condition to the effectiveness of a regulation imposed by Congress. The Secretary is free to determine the facts from any available source. The referendum among producers is only a means provided by the Act to assist him in determining the required facts. (See pp. 108–118 *infra*).

C. The provisions of the Act relating to orders regulating the handling of milk are consistent with

the requirements of the Fifth Amendment. The provisions authorizing and directing the fixing of minimum prices to be paid to producers do not violate the due process clause of the Fifth Amendment. In *Nebbia v. New York, supra*, this Court held that the fixing by a State of prices to be paid for milk does not violate the Fourteenth Amendment. The restraint imposed upon Congress by the Fifth Amendment is no greater than the restraint imposed upon the states by the Fourteenth Amendment.

The provisions setting up the producer settlement fund do not violate the due process clause of the Fifth Amendment. These provisions do not take away money from one handler and give it to another, but simply equalize the burden of surplus milk so that the pressure of that surplus will not disrupt marketing conditions and depress prices to all producers. This surplus is an indispensable incident to the milk business, and orderly marketing conditions require that it be equally distributed. A producer who previously enjoyed a fluid milk market is compensated for the loss of that market by the higher average of prices and the resulting orderly marketing conditions. Analogies are found in the Workmen's Compensation Acts, Bank Deposit Insurance Acts, and the decisions of this Court upholding the power of Congress to require railroad companies to share the burdens incident to the operations of an efficient national transportation system, even though those burdens bear more heavily on some railroad companies than on others.

The provisions authorizing the Secretary to require handlers subject to an order to pay their share of the expense of administration do not violate the due process clause. As incidental to a valid regulation, Congress can require the persons subject thereto to contribute to the expenses of administering the regulation.

The provisions of the Act which permit cooperative associations to blend the net proceeds of all sales in all markets and to make distribution thereof to producers in accordance with the contract between the association and its producers do not violate the due process clause of the Fifth Amendment. Cooperative associations are required to account to the equalization pool at the class prices for milk handled by them but are not required to return an amount equal to the exact uniform price to their producers each month.

The difference in treatment accorded to cooperative associations is based upon substantial differences between such associations and other handlers and reflects a long standing policy of Congress. The validity of this classification has been consistently upheld by the courts. Cooperative associations are simply groups of producers distributing their own milk, whereas other handlers purchase milk from producers and have an interest different from, if not antagonistic to, producers. The nature of the cooperative association requires that it be exempted from such provision and also precludes the possibility that such exemption would be used as a competitive

weapon to enable it to undersell other handlers (Supp. 118–150 *infra*).

II. The Validity of the Order

A. The pleadings do not allege that Sections 5 and 6 of Article VII are not authorized by the Act and in any event appellees are not injured by these provisions and have no standing to complain of them. The cooperative payments authorized by Section 5 of Article VII reimburse cooperative associations for services which they perform in supplying milk to the Class I market during times of short supply and in securing the utilization of milk at times of long supply in such a manner as to insure the greatest possible return to producers. This provision is authorized by Section 8c (5) (B) of the Act, which authorizes the Secretary to incorporate in an equalization plan such adjustments as are necessary equitably to apportion the total value of the milk purchased by any handler or all handlers among producers and associations of producers on the basis of their marketings of milk. These provisions are also authorized by Section 8c (7) (D). They are necessary to effectuate the other provisions of the Order because cooperative associations could not afford to perform without compensation the services specified in this section. The market service payments authorized by Article VII, Section 6) are likewise necessary to effectuate the other provisions of the Order. These payments reimburse handlers for the expenses incurred in receiving surplus milk from producers and transferring such milk to a plant where

it can be utilized in manufactured form. In the absence of such a provision, it would not be possible for handlers to accept this milk from producers.

B. There was substantial evidence before the Secretary supporting the terms and provisions of Order No. 27, and the District Court so found. There was also substantial evidence before the Secretary supporting all the findings of the Secretary. The determination of the Secretary that the order was approved or favored by at least two-thirds of the producers was based upon a referendum fairly conducted. Prior to the referendum, producers had every opportunity to become familiar with the terms of the Order. The District Court erred in finding that there was no substantial evidence to support the Secretary's determination (Supp. 164–167, *infra*).

C. The District Court exceeded its powers with respect to its jurisdiction to review the administrative findings and determinations made by the Secretary.

The finding of the District Court that there was no substantial evidence before the Secretary to support a finding as to producer approval is so obviously wrong that it is clear that the District Court was passing on the weight of the evidence, and there was no evidence to support this finding of the court. The referendum was fairly conducted and there was no misrepresentation as to the terms of the Order. Even if there had been, this would not have affected the validity of the Secretary's determination. The District Court erred in substituting its judgment for the judgment of the Secretary and holding that certain provisions of the

Order are discriminatory. The determinations of the Secretary are conclusive upon the Court if supported by substantial evidence (see pp. 167–175 *infra*).

D. In its operation and effect Order No. 27 does not deprive appellees of their property without due process of law. None of the various provisions which are asserted by appellees to be discriminatory are in fact discriminatory. The failure to require cooperatives to return the uniform price to producers each month does not enable cooperatives to undersell appellees in the market because cooperatives are interested in securing the highest possible returns for producers and the nature of the cooperative assures that it will return the producers the highest possible amount and not dissipate the producers' money in price cutting. There is no evidence that any cooperatives have engaged in price cutting, but there is affirmative evidence establishing the opposite. The failure to regulate milk received at approved plants and sold outside the marketing area is not discriminatory. There is no evidence that the prices paid by handlers for such milk are unreasonably low or that any profits derived from sales out of the market are used to depress prices in the market.

The payments to cooperatives and market service payments simply reimburse cooperatives and other handlers for the expenses incurred in performing definite services for the market and are not discriminatory. The Class III–A, IV–A, IV–B prices, the butter fat differentials, and transportation and location differentials are all reasonable and confer no

competitive advantage upon any group of handlers at the expense of any other group.

Even were the terms of the Order shown to confer competitive advantages on certain groups, there is no evidence in the record that any of the appellees have been injured. They have not established that the operation of the order has made their business unprofitable or that they operate with reasonable efficiency. There is no evidence that the prices of milk in the sections of the marketing area in which they sell milk are lower than the delivered cost of milk. There is no evidence that any of the groups of handlers which are claimed to have competitive advantages engaged in price cutting except one handler who opposed the order. There is no showing that the class prices are unduly high. The evidence establishes that the break-down of prices in the marketing area has resulted from the willingness of handlers to gamble that the order will not be enforced and they will be able to retain profitably the business acquired by price cutting. The real complaint of the appellee Jetter Dairy Company, Inc., is that the Order prevents it from engaging in reckless price cutting by passing back competitive losses to the producer. While the appellee Central New York Cooperative Association, Inc., would be able to return a higher price to its producers if it were exempted from the Order and if the Order were enforced against everyone else, it cannot be ~~assured~~ assumed that it would be able to return as high a price if the Order were not in effect (see pp. 176–182 *infra*).

III. The District Court Should Have Granted the Relief Demanded

A. If the Act is constitutional and the order is otherwise valid, its validity would not be affected by the alleged fact that its proponents proposed the Order as part of a conspiracy to injure the appellees. But there is no evidence that the proponents of the Order acted from improper motives and the reasonable inference is that they were actuated by a desire to improve the position of the producer (see pp. 183–188 *infra*).

B. Section 8a (6) of the Act clearly vests the District Court with jurisdiction to grant the relief demanded (see pp. 188–189 *infra*.

C. The appellees are all subject to Order No. 27. Each of the appellees is engaged in the handling of milk received at one or more approved plants and each of the handlers is a handler as defined in Order No. 27. Some of the milk of some of the appellees is shipped to the marketing area through the State of New Jersey and all milk handled by the appellees is sold in the marketing area in competition with milk which travels to the marketing area through the current of interstate commerce. Approximately 50% of the milk which is sold in the marketing area travels to the marketing area in interstate commerce and unless all milk sold in the marketing area is subject to the same regulation, the result will be discrimination against the milk which travels in the current of interstate commerce. The operations of all the appellees are either in the current of inter-

tate commerce or burden, obstruct, or affect interstate commerce. Congress has power to regulate prices in intrastate sales to protect interstate commerce from discrimination (see pp. 189–193, *infra*).

D. The appellees have violated Order No. 27: It is conceded that all of the appellees have violated Order No. 27 except that the appellee Central New York Cooperative, Inc., asserts that the milk handled by it is exempted from the equalization provisions of the Order because produced on the "handler's own farm." This appellee owns no farms but handles the milk produced by its members upon farms owned by them and all the milk handled by it is subject to the equalization provisions of the Order (see pp. 193–195, *infra*).

ARGUMENT

I. The Constitutionality of the Act

THE PROVISIONS OF THE ACT RELATING TO ORDERS REGULATING THE HANDLING OF MILK CONSTITUTE A VALID EXERCISE OF THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE

. The provisions authorizing and directing the fixing of minimum prices to be paid to producers.

Section 2 of the Act (Appendix A, pp. 1–2) declares hat it is the policy of Congress "through the exercise of the powers conferred upon the Secretary of griculture * * * to establish and maintain uch orderly marketing conditions for agricultural ommodities in interstate commerce as will establish rices to farmers at a level that will give agricultural ommodities a purchasing power with respect to rticles that farmers buy, equivalent to the purchas-

ing power of agricultural commodities in the base period."

Section 8c (1) of the Act (Appendix A, p. 3), which authorizes the Secretary of Agriculture to issue marketing orders, expressly provides that the orders shall regulate "only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."[13]

[13] Section 10 (j) of the Act (Appendix A, pp. 15-16) defines interstate or foreign commerce as follows:

"The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed."

The definition in Section 10 (j) is essentially the same as that in the Packers and Stockyards Act (c. 69, 42 Stat. 159; 7 U. S. C. 181–229) and in the Commodity Exchange Act (c. 369, 42 Stat. 998, as amended by c. 545, 49 Stat. 1491–1501; 7 U. S. C. 1–17a). The constitutionality of both of these statutes has been sustained by this Court. *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262

The regulation provided by the Act is strictly con-ned to transactions in or directly affecting interstate ommerce. After summarizing the provisions of the ct relating to orders regulating the handling of ilk, the Circuit Court of Appeals for the First Cir-uit observed in *United States et al.* v. *David But-ick Company et al.*, 91 F. (2d) 66, at page 68 (cer-orari denied, 302 U. S. 737):

> It is apparent from a reading of these provisions that neither section 8b nor section 8c (1) and its subdivisions *have any direct relation to the control or regulation of agricultural production, but solely to the marketing of milk and certain fruits bought and sold in interstate commerce—a matter within the exclusive control of Congress and not of the states.* [Italics supplied.]

The Act does not forbid, nor does it authorize an rder which forbids, the shipment of milk in inter-ate commerce. It does not attempt to limit the nount of milk which may be shipped by a producer a handler. Under the Act and the Order a roducer is free to produce as much milk as he ishes and to sell it all in interstate commerce. It clearly distinguishable therefore from the process-g tax and benefit payment provisions of the Agri-ultural Adjustment Act, which were held invalid in

S. 1; *Moore* v. *Chicago Mercantile Exchange*, 90 F. (2d) 5 (C. C. A. 7), certiorari denied, 302 U. S. 710; *Bennett* v. *ard of Trade of the City of Chicago*, 90 F. (2d) 735 (C. C. A. certiorari denied, 302 U. S. 710; *Board of Trade of Kansas ty* v. *Milligan*, 90 F. (2d) 855 (C. C. A. 8), certiorari nied, 302 U. S. 710.

United States v. *Butler*, 297 U. S. 1. That decision has no application here. *United States et al.* v. *David Buttrick Company et al.*, *supra*, at page 68.

This Act regulates the prices to be paid for milk which is in interstate commerce, or which affects such commerce, and provides additional regulation to assure that interstate commerce in milk shall not be disrupted. It is settled that sales of commodities for transportation in interstate commerce are interstate commerce and are subject to regulation by Congress. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 60; *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

Although this Court has never directly passed upon the question of the power of Congress to regulate the price of commodities moving in interstate commerce, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the separate opinion of the Chief Justice and the dissenting opinion pointed out that Congress has constitutional authority to impose such regulations on commodities moving in interstate commerce. That case involved the constitutionality of the Bituminous Coal Conservation Act of 1935, which attempted to regulate labor relations and wages in the coal industry, and the price of coal moving in interstate commerce. The majority of the Court held that the labor provisions of the Act were unconstitutional, that the price provisions were inseparable from the labor provisions and that, consequently

he whole statute must fall. The majority did not nd it necessary to pass on the constitutionality of he price provisions, but in his separate opinion the hief Justice said (p. 319):

* * * The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. *Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power*, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. . The Court has repeatedly stated that the power to regulate interstate commerce among the several states is supreme and plenary. *Minnesota Rate Cases*, 230 U. S. 352, 398. It is "complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. We are not at liberty *to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce.* See *Nebbia* v. *New York*, 291 U. S. 502.

Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. * * * [Italics supplied.]

The dissenting opinion, referring to value of coal for interstate transportation, stated (p. 326):

> *To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences.* The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin* v. *Seelig*, 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *Head Money Cases*, 112 U. S. 580, 593; Story, Commentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. [Italics supplied.]

Although, aside from these two opinions, members of this Court have not passed upon federal legislation directly fixing prices in interstate commerce, the power of Congress to regulate contracts in or directly affecting interstate commerce has been frequently exercised and has never been doubted. Upon that power rest many of the most familiar federal statutes—for example, the Sherman Anti-Trust Act (15 U. S. C. 1–7), many provisions of the Clayton Act (15 U. S. C. 12–27, 44), the Federal Trade Commission Act (15 U. S. C. 41–65), the Commodity Exchange Act (7 U. S. C. 1–17a), and the Packers and Stockyards Act (7 U. S. C. 181–229). Section 3 of the Clayton Act, prohibiting so-called tying clauses, illustrates the exercise by Congress of its power to

prohibit certain types of terms in contracts of sale. The power of the Federal Trade Commission to prohibit unfair forms of advertising can only be sustained because such advertising is incidental to interstate sales.

Price is a term like any other term in a contract, and the power to regulate terms of contracts carries with it the power to regulate the price, both being subject to the requirements of due process. Congress has exercised this power, for example, in Section 2 of the Clayton Act, which directly regulates the price term in interstate commerce by prohibiting discrimination in prices to different purchasers. Again, in the Packers and Stockyards Act Congress has authorized the Secretary of Agriculture to regulate the service charges of market agencies buying or selling livestock on commission bases or furnishing stockyard services.[14]

It is well established also that Congress has power to regulate activities which affect prices in interstate commerce even though the activities regulated may not be themselves in interstate commerce. And Congress may impose such regulations for the purpose of affecting such prices. In *Stafford* v. *Wallace*, 258 U. S. 495, upholding federal regulation of intrastate transactions at stockyards, this Court pointed out pp. 514–515):

[14] *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426.

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. * * * Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. * * *

In the Grain Futures Act (42 Stat. 998; 7 U. S. C. 1–17), upheld in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, Congress made use of the commerce power to regulate trading practices on grain exchanges. The regulation was held to be valid because of the effect of these practices in depressing the price of commodities moving in interstate commerce. The Court said (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the country-wide price of

> the article directly affect the country-wide commerce in it.[15]

In *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 163, the Court declared (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or *to fix the price* of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. [Italics supplied.]

In *Coronado Co.* v. *United M. Workers*, 268 U. S. 295, the Court said (p. 310):

> But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce *or the price of it in interstate markets*, their action is a direct violation of the Anti-Trust Act. [Italics supplied.]

Since the federal power recognized in these and other cases extends to the regulation of activities which affect interstate prices and may be exerted for the purpose of affecting such prices through regu-

[15] This Court has refused to review by writs of certiorari the decisions of two circuit courts of appeals upholding the constitutionality of the Commodity Exchange Act, which amplified and extended the Grain Futures Act. *Bennett et al.* v. *Board of Trade of the City of Chicago et al.*, 90 F. (2d) 735 (C. C. A. 7), certiorari denied, 302 U. S. 710; *Board of Trade of Kansas City, Missouri, et al.* v. *Milligan et al.*, 90 F. (2d) 855 (C. C. A. 8), certiorari denied, 302 U. S. 710; *Moore* v. *Chicago Mercantile Exchange et al.*, 90 F. (2d) 735 (C. C. A. 7), certiorari denied, 302 U. S. 710.

lation of such activities, *a fortiori* the power must extend to the regulation of interstate prices themselves. Obviously, the most direct and appropriate way to regulate prices is to regulate prices. Certainly Congress may do directly that which it may do indirectly.

Furthermore, the power of the Federal Government to regulate prices of commodities moving in interstate commerce is evident from the decisions of this Court which deny the power of the states to regulate either the price of commodities in interstate commerce or activities which affect prices in interstate commerce although recognizing the existence of power in the states to regulate prices or to regulate activities affecting prices which are within the sphere of state police power.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, in striking down a North Dakota statute which regulated the grain business and included a provision for the fixing of prices by a state officer, the Court stated at p. 60–61:

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases *and to secure payment to them of fair prices* for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed.

See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

Similarly, in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, it was held

that the rates for electricity produced within one state and sold within that state for transmission to another state are not subject to regulation by the state. The majority and minority opinions state clearly that the power to regulate the rates resides in the Federal Government. The Court said (p. 90):

> The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of the power vested in Congress.* [Italics supplied.]

In the dissenting opinion it was said (p. 91):

> If the Commission lacks the power exercised, it is solely because the electricity is delivered for use in another State. That fact makes the transaction interstate commerce, *and Congress has power to legislate on the subject.* [Italics supplied.]

In the *Head Money Cases*, 112 U. S. 580, a decision that a federal statute regulating immigration was a valid exercise of the commerce power was reached on the basis of prior decisions, holding state regulation of the same subject matter unconstitutional. Of these cases the Court said (p. 593–594):

> It cannot be said that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the state statutes were void only because Congress, and not the states, was authorized by the Constitution

> to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the state held void. *It was therefore of the essence of the decision which held the state statutes invalid that a similar statute by Congress would be valid.* [Italics supplied.]

On the basis of these principles, *Baldwin* v. *Seelig*, 294 U. S. 511, sustains the existence of the federal power to fix prices in interstate commerce. A provision in the New York Milk Control Act forbade all sales of milk bought in other states at a price less than that permissible in New York. The provision was held to be invalid, even as applied to milk sold in other than the original containers, because it was an attempt to regulate interstate commerce. The Court said (p. 522):

> * * * If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted *by subjecting commerce between the states to the power of the nation.* [Italics supplied.]

Such exclusion of the states from the regulation of prices and of activities affecting prices in interstate transactions points directly to the conclusion expressed in the dissenting opinion in the *Carter* case, *supra*, p. 95, that the constitutional inhibition of state regulation of prices in interstate transactions discloses the existence of that power in Congress—that

to hold otherwise would be to create a vacuum in the field of interstate commerce from which both state and federal authority would be excluded, although the power of the states to regulate prices within the field of their police power had been approved. *Nebbia* v. *New York*, *supra*.

But, as the opinion of the Chief Justice in the same case points out (*supra*, p. 96), the power of the Federal Government in the field of interstate commerce is coextensive with the power of the states in their spheres, and with respect to interstate commerce the power of Congress is a plenary power "complete in itself," and subject only to the limitations of the Fifth Amendment. *Minnesota Rate Cases*, 230 U. S. 352, 398; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 227; *Currin* v. *Wallace*, No. 275, *supra*. The power of Congress in the field of interstate commerce is commensurate with this power of the states. See *Baldwin* v. *Seelig*, *supra*; see also *Carter* v. *Carter Coal Co.*, *supra*.[16]

2. The Equalization Provisions

If Congress has the constitutional power to enact the price-fixing provisions, such power necessarily

[16] It seems clear that just as the power of the States to fix prices is not precluded by the Fourteenth Amendment, the power of Congress to fix prices in the field of interstate commerce is not precluded by the Fifth Amendment. In *Nebbia* v. *New York*, in sustaining the power of the State of New York to fix prices in intrastate transactions the Court pointed out (p. 525) that:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare."

carries with it the power to enact such provisions as are necessary or appropriate to the effective exercise of the price-fixing power and the accomplishment of the desired protection to interstate commerce in milk. The intent of the framers of the Constitution to confer upon Congress full power to carry into effective execution the powers expressly delegated to the Federal Government is clear from the last clause of Section 8 of Article I of the Constitution. Wide latitude is accorded by the courts to Congress in its determination of what means are necessary and appropriate to effectuate its policy in the exercise of its granted powers.[17]

That market-wide equalization is an appropriate means of protecting interstate commerce in milk cannot be doubted. The troubles which have beset the milk industry in the past have resulted primarily from the failure to distribute equally among producers the burden of the surplus milk. In *Nebbia* v. *New York*, *supra*, this Court made reference to these facts as expressed in the following statement, quoted in that opinion at pp. 517–518.

> A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed, the pressure to market surplus milk in fluid form will be a serious disturbing factor.

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[17] *Union Pacific R. Co.* v. *Meyers*, 115 U. S. 1, 18; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *United States* v. *Coombs*, 12 Pet. 72, 78; *In re Debs*, 158 U. S. 564, 578; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 303.

To assure a satisfactory stabilization of prices for milk, it is not sufficient to fix the price to the handler. If a classified price scheme is adopted, it is necessary also to include some provision for distributing the advantages of the fluid milk market and the burden of the surplus among all producers. The disruptions of interstate commerce in the past have resulted from two factors, the competitive advantage enjoyed by handlers who assumed no responsibilities for the disposition of any of the surplus milk, and competition among producers to secure a greater proportionate share of the fluid milk market. The fixing of minimum prices to be paid by handlers for milk classified according to its use is designed to correct the first of these conditions by requiring all handlers to pay the same price for all milk which they purchase in the same class, but market-wide equalization is necessary to correct the destructive competition between producers, which has been one of the major causes of unstabilized marketing conditions.[18] If

[18] This may best be illustrated by an example. For the month of September, the Class I (fluid milk) price was $2.45 per cwt. The Class IV–A (butter) price was 93½ cents. Let it be assumed that two handlers, both of which are approved for the New York market, have plants located within a short distance of each other. "A" handles all the milk which it receives in fluid form. "B" makes 90% of its milk into butter and 10% is sold as fluid. Producers delivering milk to "B" produce milk of the same quality and are forced to comply with the same sanitary requirements as the producers delivering milk to "A", but under a classified price scheme which did not involve equalization, "A" would pay its producers $2.45 per cwt. for all milk delivered, whereas "B" would pay its producers for 90% of their milk at the

the classified use plan be accepted as an appropriate method of pricing milk to handlers, some form of equalization is necessary, if the producer is to realize the benefits of those prices. The market-wide equalization pool is a recognized method of solving the problem of surplus milk.[19] The differentials and

Class IV–A price, and for 10% of their milk, at the Class I price, making a blended price to its producers of approximately $1.07 per cwt.

Since the Class IV–A price represents the approximate value of milk for the manufacture of butter, "B" could not afford to pay a higher price for its milk, but, on the other hand, the producers delivering milk to "B" cannot comply with the sanitary requirements and produce milk for sale at this price. The result is that they must evade the sanitary requirements or seek a more advantageous market. Faced with this situation, the likelihood is that they will attempt to sell milk to "A" at prices below the Class I price but higher than they are receiving from "B". An equalization scheme removes the incentive on the part of producers to evade the order by assuring each producer his proportionate share of the Class I market at a reasonable price. In the example just given, if it be assumed that "A" and "B" are the only handlers supplying the marketing area, the uniform price would be $1.76. Each producer would receive this amount. Instead of paying its own producers $2.45, "A" would pay them $1.76 and would pay the balance of 69¢ to the Market Administrator. The Market Administrator would pay this sum to "B", who would add it to the price of $1.07 per cwt. which he owed for his milk and pay his producers the uniform price of $1.76. In this way the depressing effect of competition between producers is avoided, each handler pays the same price for his milk in the same class and each producer receives the same price for his milk.

[19] A market-wide equalization pool created under an Indiana statute was upheld in *Milk Control Board* v. *Crescent Creamery, Inc.*, 14 N. E. (2d) 588. Rehearing denied, 15 N. E. (2d) 80. Appeal dismissed October 10, 1938, 59 Sup. Ct. 87. Rehearing denied, 59 Sup. Ct. 143.

special payments for which provision is made in the Order are necessary to complete the equitable distribution of the burden of surplus milk. Since equalization is necessary to enable the producer to realize the benefit of the prices fixed by the Order and to insure the free flow of milk in the current of interstate commerce, it follows that the provisions of the Order setting up the Producer Settlement Fund are within the powers conferred upon Congress by Section 8 of Article I of the Constitution. An analogy may be found to support this conclusion in decisions dealing with the power of Congress over the rates charged by interstate railroads. It is well settled that the power of Congress to fix the rates charged by interstate carriers carries with it the power to provide for an equitable distribution of the proceeds of those rates.[20]

The same reasoning supports the constitutionality of the charge for administrative expenses imposed by Article X of Order No. 27.

B. THE ACT DOES NOT INVOLVE ANY UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

1. There is no improper delegation of legislative power to the Secretary of Agriculture

This Court has said that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly" and that "the Constitution has never been regarded as denying to the Congress the neces-

[20] *New England Divisions Case*, 261 U. S. 184, and *Dayton Goose-Creek Ry. v. United States*, 263 U. S. 456.

sary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."[21]

Congress has defined the policy and established the standards to guide the execution of that policy through each of the steps required for initiating and administering the orders. The facts to be found and applied in making the determinations required by the Act are all facts ascertainable from information available to the Secretary. Their ascertainment and application in determining when an order shall be issued or amended, in determining the subjects and the area to which it shall apply and in selecting terms, determining minimum prices and providing for other details of its operation, are guided in each instance by a statutory designation of the objectives Congress seeks to attain, the factors it intends the Secretary to consider, and the character of the action to be taken on the facts found. These specifications of the ends and the means of each action are found in the Act in detail as precise as is practicably consistent with effective administration of a broad plan for regulating intricate and complex economic relationships.

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[21] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530. *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

The objective is a price to producers which will give to milk and its products which are in or which affect interstate commerce a purchasing power equivalent to a "parity price" defined in the Act [22]. In considering whether an order shall be issued, where it shall apply,[23] and what its terms shall be, the Secretary is to ascertain first those prices which will give milk a purchasing power equivalent to this parity price—equivalent to that of milk during a defined base period,[24] if there are adequate figures available for making that determination. If not, a different base period, also specified in the Act, is to be used.[25] These provisions indicate a careful regard by Congress for the practical necessity of a workable standard.[26]

This formula for determining the "parity" objec-

[22] Section 2 (Appendix A, p. 1) defines the policy to be "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period. * * *"

[23] See Section 8c (11) (Appendix A, p. 9).

[24] Section 2 (Appendix A, p. 1) defines the base period for milk as the pre-war period August 1909 to July 1914.

[25] Section 8 (e) (Appendix A, p. 13) provides that if the purchasing power of the commodity cannot be established for the 1909–1914 period from available statistics, the base period shall be the later period August 1919 to July 1929, or that portion of the later period for which the Secretary finds that the purchasing power of the commodity can be satisfactorily determined from such statistics.

[26] In issuing Order No. 27 the Secretary found that the purchasing power of milk handled in the marketing area could not be satisfactorily determined from statistics available for the base period August 1909 to July 1914, but could

tive is clear and fundamentally simple. It is to be applied to figures available to the Secretary and regularly gathered by the Department independently of the Act.[27] It is subject, however, to certain prescribed adjustments.

In the case of milk, Section 8c (18) (Appendix A, p. 11) requires the Secretary to adjust the parity objective of the order so as to reflect feed supplies and feed prices, and other conditions which affect supply and demand for milk and milk products in the marketing area. In case he finds that the parity price derived through the basic formula is unreasonable in view of these factors, he is to adjust the prices sought to be obtained through an order to a level which will reflect such factors and will provide adequate quantities of wholesome milk and be in the public interest. See *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285; *Avent* v. *United States*, 266 U. S. 127; *United States* v. *Chemical Foundation*, 272 U. S. 1. He is also to adjust the minimum prices from time to time after the order is issued if that is necessary to reflect changes in the relationship of

be determined for the period August 1921 to July 1929, and therefore found and proclaimed the latter period to be the base period for the purposes of the Order (Appendix B, p. 2).

[27] Since 1909 the Department has collected information on prices of articles that farmers buy and has published at quarterly intervals an index of prices based on such information. These statistics have been collected according to a regularly established procedure and are the official statistics used by the Department in its activities.

these modifying factors. Such adjustments relate to practical economic factors which are evident from information available to the Secretary, and the effect of which upon the supply and demand for milk, and upon the reasonableness of milk prices may be readily ascertained. The Act thus makes it clear that the Secretary is not to prescribe prices designed merely to attain the mathematical parity level without regard for the practical limits to fair and effective regulation which these factors impose.

Similarly, by virtue of Section 2 (1) (Appendix A, p. 2), the Secretary is required to make further adjustment in the prices sought to be obtained through any order from the figure which would give the purely mathematical parity purchasing power in order to take into account consumers' interests. This section makes it clear that the Secretary is not to issue orders calculated to raise prices suddenly to the parity level in disregard of the possibly adverse effect of such sudden adjustments upon consumers, and, indeed, upon the likelihood of making the regulation effective at all. Instead he is to adjust the prices sought to be obtained, downward from those which would bring full parity returns, to such extent as is necessary to approach the parity level "by a gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets." Moreover, he is prohibited by Section 2 (2) from authorizing action designed to keep prices above the

parity level. The appellees certainly cannot object to this provision, which merely prevents the prices required from approaching too suddenly, or from exceeding, the higher prices which the Act would require to be prescribed or otherwise achieved in the absence of the provision.

The Secretary is to commence proceedings for issuance of an order only when he has reason to believe that the issuance of the order will tend to accomplish the establishment of prices for the commodity, determined according to the standards indicated above. But he is not authorized to issue the order merely upon the basis of a reason to believe that it is likely to establish prices at that level. He is required to give due notice and an opportunity for hearing on the proposed regulation, and is to receive evidence, and must make a finding that the issuance of the order and the terms which it contains (which must be terms prescribed in the Act and no others) [28] will tend to effectuate the establishment of the prices determined according to the formula just described.

Thus the statute supplies practical working guides for determining the objective of each order. And it prescribes the terms of the orders and the other steps to be taken in attaining that objective. These constitute definite directions for administrative action in a channel the direction and limitations of which the Act makes plainly evident. The Act leaves the Secretary some discretion but no more than is rea-

[28] Section 8c (5) (Appendix A, p. 4) and Section 8c (7) (Appendix A, p. 6).

onably consistent with fair adaptation of the regula-
ion to contingencies and conditions certain to be
ncountered in administering an Act of this charac-
er; no more than is necessary to find facts which
Congress has clearly specified and to apply the law
airly to the facts found. The alternative of definite
igid specification, in the Act, of exact prices to be
ixed, exact commodities to be affected, and exactly
pecified times at which regulations should become
ffective, would be completely unworkable and could
ot avoid unreasonable, arbitrary, and capricious
esults in the face of particular circumstances which
Congress could not conceivably anticipate and pro-
ide for in such detail. Congress has gone far in
rescribing the terms which, alone, an order may
ontain.

We submit that the determinations required to be
ade as to all steps to be taken in the administration
f this Act are guided by objectives more definite, and
tandards of action more precise than those provided
y many statutes heretofore sustained by this Court
gainst attack on the ground of delegation of legisla-
ve power.

In the following cases specific objections that the
ords used in the statute were so indefinite as to
rovide no sufficient standard were overridden.
Mutual Film Corp. v. *Ohio Industrial Commission*,
36 U. S. 230, 245–246 (educational, moral, amusing,
harmless); *Mahler* v. *Eby*, 264 U. S. 32, 40–41
ndesirable residents); *New York Central Securities*

Company v. *United States*, 287 U. S. 12, 24–25 (public interest); *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest, or necessity); *Frischer and Co.* v. *Elting*, 60 F. (2d) 711 (C. C. A. 2, 1932), certiorari denied, 287 U. S. 649 (unfair methods of competition and unfair acts the effect or tendency of which is to destroy or substantially injure an industry). Other cases in which statutes using general words as a standard have been upheld are *Avent* v. *United States*, 266 U. S. 127, and *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Wayman* v. *Southard*, 10 Wheat. 1 (in their discretion deemed expedient); *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Company* v. *United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (just and reasonable commissions).

2. The Provisions of the Act Relating to Approval by Producers Do Not Involve Any Unconstitutional Delegation of Legislative Power to Producers

Section 8c (9) of the Act (Appendix A, p. 8) provides that an order shall not become effective unless the Secretary determines, in addition to other prerequisite facts, that the issuance of the order is approved or favored by at least two-thirds of the producers who, during a representative period, were engaged in the production of milk for sale in the marketing area or by producers who, during such

period produced at least two-thirds of the volume of milk sold in the marketing area.

It is contended that this provision delegates to the producers a legislative power to impose an order upon a particular market. Clearly it does not have that effect. As in the comparable provision of the Tobacco Inspection Act, 49 Stat. 731, 7 U. S. C. §§ 511 (a)–511 (q), considered in *Currin* v. *Wallace*, *supra*, Congress, by this provision has "merely placed a restriction upon its own regulation by withholding its operation as to a given market," unless the Secretary determines that two-thirds of either of two groups of producers favor it. As this Court pointed out in *Currin* v. *Wallace*, such a provision does not involve any delegation of legislative authority to the producers. They may not "make the law and force it upon the minority." Cf. *Carter* v. *Carter Coal Co.*, *supra*. Here, as in the Tobacco Inspection Act, Congress has exercised its legislative authority by imposing a regulation and prescribing the conditions upon which it shall apply. The finding by the Secretary that the producers approve or favor it is merely one of these conditions.[29]

In fact, under the provision in this Act the producers' approval is more clearly only a fact to be found than it is under the provision considered in the *Currin* case. In that case the Secretary was required

[29] See *Hampton & Co.* v. *United States*, 276 U. S. 394, 407; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 310, 318; *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 122.

to conduct the referendum. If it resulted unfavorably he had no authority to make the regulation effective. Here, on the other hand, Section 8c (9) does not require a referendum among producers but merely requires that the Secretary determine the fact that the required percentage of producers approve the issuance of the order. He is free to ascertain the fact from whatever sources he finds available. A referendum is not necessary.

However, Section 8c (19) authorizes the Secretary to utilize a referendum among producers as a means of ascertaining this fact of producer approval or disapproval, and provides that the requirement of a determination that sufficient producers approve the order shall be satisfied if, of the total number of producers, or the total volume of production represented in the referendum, the percentage approving or favoring the order equals or exceeds the percentage required by Section 8c (9). Since an absolute requirement of a binding referendum among producers such as that involved in the *Currin* case is properly to be considered as merely imposing a condition to be satisfied before the law becomes effective, *a fortiori* this statute imposes only such a condition and plainly involves no unlawful delegation of legislative power to producers.

Moreover, the possibility that an adverse vote of producers may withhold the application of the statute is further diminished in this Act by the provision that approval of the order by the requisite per-

centage of one of several classifications of producers would justify the issuance of the order. For example, although two-thirds of the number of producers might fail to approve, the order could become effective if the producers of two-thirds of the volume of milk production were found to favor it, or vice versa. There can be no doubt that the producer approval required under this Act is only a condition to the regulation becoming effective and that there is no delegation of legislative power to producers.

C. THE PROVISIONS OF THE ACT RELATING TO ORDERS REGULATING THE HANDLING OF MILK ARE CONSISTENT WITH THE REQUIREMENTS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

1. The provisions authorizing and directing the fixing of minimum prices to be paid to producers do not violate the due process clause of the Fifth Amendment of the Constitution of the United States

The question as to whether the provisions of the Act relating to orders regulating the handling of milk are consistent with the due process clause of the Fifth Amendment should be considered in the light of the general principle laid down in *Nebbia* v. *New York*, 291 U. S. 502 (p. 523):

> But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

Appellees may contend that the concept of due process of law establishes some rigid and closed class or category of businesses affected with a public interest from which the business of handling milk is excluded and that consequently any attempt to regulate the price of milk is an invasion of a right of freedom to contract which is guaranteed by the Fifth Amendment. This contention, however, is foreclosed by decisions of this Court which hold that the concept of due process of law does not prohibit legislation regulating the price at which milk may be sold.[30]

In *Nebbia* v. *New York*, *supra*, a New York statute which established a milk control board and authorized the board to fix prices at which milk might be bought from producers and sold to consumers was attacked on the ground that it violated the due process clause of the Fourteenth Amendment. In sustaining the regulation the Court said (pp. 531–532):

> We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. * * * But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no

[30] *Nebbia* v. *New York*, 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608.

such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U. S. 113.

(p. 537):

So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, *a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.* If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. [Italics supplied.]

(pp. 538–539):

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful

> to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

The principles laid down in that case were recently applied by this Court in upholding the constitutionality of a Virginia statute which provided for regulation of the price of milk.[31]

It may be suggested that although these decisions dispose of the question of due process so far as it relates to price-fixing by a state, they have no application to a case where price regulation is attempted

[31] *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608.

by the Federal Government. As we have indicated above, the due process clause of the Fifth Amendment imposes no greater limitation upon the power of Congress to regulate interstate commerce than the due process clause of the Fourteenth Amendment imposes upon the exercise by a state legislature of its police power.[32] We have pointed out also that the fixing of prices is necessary to correct and prevent the conditions in interstate commerce in milk which this Act seeks to eradicate (*supra*, pp. 104–108). The minimum prices prescribed in the Order apply equally to all handlers with respect to each of the classes of milk established by the Order. There is no discrimination between handlers, and none is claimed with respect to the provisions fixing prices. Nor is there any showing of arbitrary or capricious action in the fixing of these prices. The record is clear that they are fair and reasonable. In these circumstances there is plainly no basis for the contention that the price-fixing provisions deprive the handlers of property without due process of law. The Court has aptly expressed the Government's position in the opinion in *Nebbia* v. *New York*, *supra*, p. 525, already quoted in part (*supra*, p. 104), with respect to the coextensive character of the state and federal powers to fix prices. Its pertinence to the circumstances in this case, additional to the reasonable relation be-

[32] See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, separate opinion of the Chief Justice at p. 319, dissenting opinion at p. 326. See also *Baldwin* v. *Seelig*, 294 U. S. 511.

tween the regulation and the objectives of the Act, perhaps justify its repetition here.

> *The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare.* They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. [Italics supplied.]

2. The Provisions Authorizing the Establishment and Operation of a Market-Wide Equalization Pool

While the provisions of the Order *fixing minimum prices* affect the appellees directly as handlers, the provisions requiring *payment to the Producer Settlement Fund* do not affect the appellees as handlers at all.

It has been pointed out that the purpose and effect of the equalization pool authorized by Section 8c (5) (B) (ii) of the Act (Appendix A, p. 4) is to equalize among producers the burden of the surplus milk while assuring to all producers the benefit of the minimum prices fixed in the Order to be paid by handlers for milk. The payments to the equalization pool (called the Producer Settlement Fund in Order No. 27) do not raise or lower the minimum

prices fixed by the Order and paid by all handlers. They relate only to the distribution among producers of the sums paid by handlers.

This money distributed through the pool does not belong to the handlers and these payments cannot be said to equalize profits among the handlers or to take money which belongs to one handler and give it to another. The money involved in these payments represents a part of the value of the milk delivered by producers; it is money which should be distributed among the producers, and it is this distribution which is accomplished by the equalization payments. The handlers as such have no right to any part of it at any time. When it is paid they are deprived of nothing. They have merely served as a conduit for its distribution among producers. Accordingly, inasmuch as the equalization payments deprive them of no property they can assert no unconstitutional exaction by the provisions which require such payments and are not in a position to contest their validity.[33]

But even if handlers should be said to have a sufficient legal interest to contest the validity of the provisions of the Act authorizing the Producer Settlement Fund, it is plain that these provisions do not violate the due process clause of the Fifth Amendment.

The equalization provisions deal with the problems created by the constant surplus of milk which is

[33] *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

always present in the marketing area and which must be present if the demands of the ultimate consumers are to be adequately supplied. The burden of this surplus is an essential and indispensable incident of the milk business. Unless it is shared equally by those engaged in the industry, recurrent disruption of the industry is inevitable.

The equalization payments are essentially fair because they provide for a mutuality of burdens and benefits. Their effect is to give all producers a share of the valuable fluid milk market commensurate with the quantity of milk they deliver and at the same time to enable all producers to bear equally the burdens incident to the inevitable and necessary surplus. A statutory provision which treats all producers with equal fairness, assures them a stable price, protects them from the hazards which have proved so harmful to their welfare in the past, and distributes the necessary burdens of the business equally and fairly among them all does not violate the due process clause of the Fifth Amendment.[34]

[34] It is asserted by the appellee Central New York Cooperative Association, Inc., that the equalization provisions of the Act deprive its producer-members of their property without due process because, if not required to make payments to the Producer Settlement Fund, it will be able to return a greater amount to its members. As pointed out *infra*, p. 182, this assertion is based on the assumption that if there was no order in effect it could sell its milk at the same prices it has obtained under the Order. This assumption ignores the fact that the Order is responsible for the higher prices which it has been able to return to producers. The appellee seeks to avoid the burdens imposed by the Order while enjoying the benefits. There is no basis for the assump-

A precise analogy is found in the Workmen's Compensation Acts. Experience has shown that accidents, with or without fault, are inevitable incidents of industry. The Workmen's Compensation Acts rest upon that fact. A statute which compels all employers in certain occupations to contribute to a common fund is constitutional even though there may be no accidents at all in the plant of a particular employer and many accidents in the plant of another.[35]

Another analogy may be found in statutes which require banks to contribute to a common fund to be used for insurance of deposits in banks which may become insolvent. Such statutes do not violate the due process clause of the Fourteenth Amendment.[36]

This Court has held that Congress in the exercise of its power to regulate interstate commerce may require railroad companies to share the burdens incident to the operations of an efficient national transportation system, even though those burdens bear more heavily on some railroad companies than on others. For example, in the *New England Divisions Case*, 261 U. S. 184, an order of the Interstate Commerce Commission which increased by 15% the share

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tion that, if no order had been in effect, the return to this appellee's producers would have been any higher than or as high as it would have been if this appellee had complied with the Order and made its payments to the Producer Settlement Fund.

[35] *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *New York Central Railroad Co.* v. *White*, 243 U. S. 188.

[36] *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Abie State Bank* v. *Bryan*, 282 U. S. 765.

of several New England railroads in joint through freight rates to the West was held valid. Prior to the making of the order by the Commission, these rates had been divided according to contracts between the carriers. The order was sustained on the ground that it was authorized by the provisions of the Transportation Act, 1920 (c. 91, 41 Stat. 456), and that those provisions of the Act which authorized the apportionment of joint rates on the basis of the greater needs of particular carriers were not unconstitutional.

In *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, the so-called recapture provisions of the Transportation Act of 1920 were upheld. These provisions required in substance, that, if the earnings of a railroad company exceeded a fair rate upon its investment, a part of the excess should be paid into a general railroad revolving fund and used by the Interstate Commerce Commission to assist other railroads which were experiencing financial difficulties. In its opinion the Court pointed out (p. 484) that the excess income over and above a fair rate on the railroad's property was "made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties".

The court below found an analogy in *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al.*, 300 U. S. 55. That case is clearly not in point. The decision rested primarily on the ground that the

evidence clearly showed that the orders issued by the state regulatory body limiting and prorating the production of gas by the several owners of land in a gas field did not bear any reasonable relation either to the prevention of waste or to the protection of correlative rights.

Here the equalization pool authorized by the statute plainly has a *reasonable relation* to the commerce regulation sought to be achieved by the Act.

In *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al., supra,* the Court said (pp. 76–77):

> * * * We assume that the prohibition of any wasteful conduct, whether primarily in behalf of other owners of gas in the common reservoir, or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated. We assume, also, that the State may constitutionally prorate production in order to prevent undue drainage of gas from the reserves of well owners lacking pipe-line connections. If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle. * * *

The court below also cited *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, invalidating the provisions of the first Railway Retirement Act, and found "a close resemblance to the pooling fund," there involved, in the equalization provisions of the Act. That decision is not controlling here.

The opinion of the majority, in holding that an attempt to make one railroad pay to provide payments for superannuated employees of other railroads was a violation of due process, rested heavily upon objections to the provisions of the particular statute there involved as applied to the industry regulated. Furthermore, that case rested in part on the ground that the pooling arrangement there involved was not shown to be related to the preservation of efficiency of interstate transportation and therefore was not an exercise of the federal commerce power upon which it purported to rest. This circumstance greatly limits the application of the Court's comments in that case. They have no application to statutory provisions which, as an essential to a regulation of interstate commerce, distribute equitably the burdens and risks inevitably and necessarily incident to engaging in the business. Cf. *Mountain Timber Co.* v. *Washington, supra; New York Central Railroad Co.* v. *White, supra; New England Divisions Case, supra; Dayton-Goose Creek Railway* v. *United States, supra.* And see the dissenting opinion in *Railway Retirement Board* v. *Alton Railroad Co.*, pp. 384–387.

3. The Provisions Authorizing the Requirement That Handlers Subject to an Order Shall Pay Their Pro Rata Share of the Expense of Administration Do Not Violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States

Section 10 (b) (2) of the Act (Appendix A, p. 14), authorizing the requirement that handlers subject to an order shall pay their pro rata share of the expense of administration, provides a reasonable and appropriate means for the accomplishment of the legitimate purposes of the statute. There can be no question as to the power of Congress to require persons under regulation to contribute to the payment of administrative expenses. In the *Head Money Cases, supra*, this Court sustained the validity of a federal statute which required shipping companies to pay 50¢ for each alien passenger brought into the United States, the money to be paid into the United States Treasury and to be expended by the Secretary of the Treasury to defray the expenses of regulating immigration and for the care of distressed immigrants. The Court upheld the statute as being incident to the regulation of foreign commerce. Although the Court did not discuss the question of due process of law, the implication of its decision sustaining the exaction necessarily is that the imposition of such a charge does not violate the Fifth Amendment.

4. The provisions which permit qualified cooperative marketing associations of producers to blend the net proceeds of all sales in all markets and to make distribution thereof to producers in accordance with the contract between the association and its producers do not violate the due process clause of the Fifth Amendment of the Constitution of the United States.

The appellees contend that the Act, and the Order issued under it, violate the Fifth Amendment because certain provisions of the Order which are required or authorized by the Act appear to be less favorable to some proprietary handlers than to producer-owned cooperative associations which are also handlers.

This contention is wholly unsound. Apparently it rests, in part at least, upon the assumption that the Fifth Amendment requires all handlers to be treated alike in federal legislation.[37] It ignores the fact that there is no equal protection clause in the Fifth Amendment and it disregards the judicial approval long since given to the established legislative policy of Congress, and of the states, to foster and encourage direct marketing of farm products by treating farmers who distribute their own products, and associations of farmers organized for cooperative marketing, differently from persons engaged merely in the business of buying farm products from the producers and selling them to others. It ignores the obvious and fundamental differences between cooperative associations, which are composed of milk producers who have organized to handle and sell their own milk, and proprietary handlers, which, as agencies wholly separate from the producers, engage only in selling, for a profit, milk produced by others and have interests distinct from those of the producers, if not, indeed, antagonistic to them.

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[37] See *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

It ignores the fact that the differences in treatment accorded by this statute and order are reasonably related to these differences between the two types of handlers and the differences in the value to the market, and the cost to the handlers themselves, of the services they perform. Furthermore, it ignores the fact that these differences in treatment are reasonably adapted to the maintenance of orderly marketing conditions for milk in interstate commerce and are necessary for that purpose. It ignores the fact that the challenged provisions deprive the complaining proprietary handlers not of any vested rights having the character of property, but merely of expedients and advantages by which they have been able to cast upon others the burdens peculiar to milk marketing, while taking its benefits.

It is the Government's position that the differences complained of are based upon a clearly reasonable classification of handlers and are consistent with a long-established legislative policy, approved by the courts, of encouraging producer-owned cooperative marketing agencies; that the differences in treatment of the two types of handlers are appropriate and necessary for the maintenance of the orderly flow of milk into the marketing area through interstate commerce, and are reasonably adapted to that end; and finally, that none of them deprive the appellees of property in violation of the Fifth Amendment but all merely minimize fortuitous opportunities for disruption of the market at the expense of the producers.

(a) *The settled legislative policy of treating producers' cooperative associations differently from ordinary business corporations rests upon a reasonable basis of classification approved by the courts*

State statutes fostering the development of cooperative associations for marketing farm products have been enacted from time to time for many years. Every state except Delaware has made provision by law for incorporation of farmers' cooperatives enjoying special privileges.[38] These laws and the special advantages conferred by them upon farmers' cooperatives have been consistently approved by the courts.[39]

[38] See statutes cited in footnote 11 to the dissenting opinion of Mr. Justice Brandeis in *Frost* v. *Corporation Commission*, 278 U. S. 515, 540, and in footnote 14 to that opinion, pp. 541–542.

[39] *Tobacco Growers Co-op. Asso.* v. *Jones*, 185 N. C. 265; *Kansas Wheat Growers* v. *Schulte*, 216 Pac. 311; *Brown* v. *Staple Cotton Growers Co-op. Asso.*, 96 So. 849; *Northern Wisconsin Co-op. T. P.* v. *Bekkedal*, 197 N. W. 936; *Dark Tobacco Gr. Co-op. Asso.* v. *Dunn*, 266 S. W. 308; *Minnesota Wheat Growers* v. *Huggins*, 203 N. W. 420; *List* v. *Burley Tobacco Growers Co-op. Asso.*, 114 Ohio St. 361; *Dark Tobacco Growers Co-op. Asso.* v. *Robertson*, 150 N. E. 106; *Potter* v. *Dark Tobacco Growers Co-op.*, 201 Ky. 441; *Harrell* v. *Cane Growers Co-op.*, 126 S. E. 531; *Nebraska Wheat Growers* v. *Norquist*, 204 N. W. 798; *Warren* v. *Alabama Farm B. Cotton Association*, 104 So. 264; *Manchester Dairy System* v. *Hayward*, 132 Atl. 12, 19; *Clear Lake Co-operative Live Stock Association* v. *Weir*, 206 N. W. 297; *Hollingsworth* v. *Texas Hay Asso.*, 246 S. W. 1068; *Washington Cranberry Asso.* v. *Moore*, 201 Pac. 773; *Poultry Producers* v. *Barlow*, 208 Pac. 93; *Oregon Growers Co-op. Asso.* v. *Lentz*, 212 Pac. 811; *South Carolina Cotton Growers* v. *English*, 133 S. E. 542;

Congress likewise has adopted the policy of aiding and encouraging the establishment and operation of such cooperatives and in numerous statutes has dealt with such cooperatives differently from proprietary business enterprises.

The Clayton Act, 38 Stat. 730, 15 U. S. C. § 17, confers a qualified and limited exemption from the operation of the anti-trust laws upon nonstock, nonprofit agricultural organizations "instituted for the purpose of mutual help." The Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291, extended this exemption to cooperative associations having common stock. The Robinson-Patman Act of June 19, 1936, c. 592, § 4, 49 Stat. 1528, 15 U. S. C., Supp. IV § 13 (a) also exempts a cooperative association from any requirement of the Act which would prevent the association from returning to its members "the whole or any part of its net earnings or surplus resulting from its trading operations in proportion to their purchases from, to, or through the association."

The War Finance Corporation Act of April 5, 1918, 40 Stat. 512, 15 U. S. C. § 348, authorized advances to cooperative associations of producers whenever they had made advances for agricultural purposes or discounted commercial paper issued for such purposes.

Milk Producers v. *Bell*, 234 Ill. App. 222 and *Barns* v. *Dairymen's League Co-operative Association, Inc.*, 220 App. Div. (N. Y.) 624.

The Grain Futures Act, 42 Stat. 998, 7 U. S. C. § 17 (e) extended privileges to cooperative associations not accorded to other business corporations. When that Act was amended in 1936 and redesignated as the Commodity Exchange Act these provisions were retained, 49 Stat. 1491, 7 U. S. C. Supp. IV, §§ 7 (e), 10 (a).

Cooperative associations were exempted from registration under the McKinley Tariff Act 44 Stat. 91, 26 U. S. C. § 750 (b). The Agricultural Marketing Act of June 15, 1929, 46 Stat. 10, 12 U. S. C. §§ 1141, 1141 (j), expresses a Congressional policy to promote merchandising of agricultural commodities in such a way as to put agriculture on a basis of economic equality with other industries. This was to be accomplished in part "By encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."

Loans to cooperative associations by the Farm Credit Administration are authorized by 12 U. S. C. § 1141 (e). By the Act of June 16, 1933, 48 Stat. 257, 12 U. S. C. §§ 1134–1134 (m); and 1138–1138 (e), the Governor of the Farm Credit Administration is directed to organize a "Central Bank for Cooperatives" and 12 banks to be known as "banks for cooperatives" to make loans to cooperative associations.

Agricultural associations have been exempt from payment of federal income taxes on corporations since 1913 (38 Stat. 172) and the 1934, 1936, and 1938 income tax laws (48 Stat. 700; 49 Stat. 1673; 52 Stat. 480; 26 U. S. C. §103 (12)) have continued this exemption.

State and federal statutes according special treatment to producers selling their products directly or through cooperative associations of producers have been frequently sustained by this Court.

Provisions of the Federal Income Tax Law of 1913, 38 Stat. 172, exempting "agricultural associations" were sustained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 173 and in *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 21. Although such exemptions result in definite competitive advantages to such associations, this Court recognized the difference between such associations and ordinary business organizations as a reasonable basis of classification sustaining the exemption.

The Grain Futures Act, 7 U. S. C. § 7(e) was sustained in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, in the face of the contention that certain of its provisions were for the benefit only of farmers' organizations, and that it enabled members of cooperative associations to escape payment of commissions which others must pay, thereby reducing the value of membership on the Board of Trade. Although members of the Board of Trade were in

competition with the cooperative associations, the Court held that the Act did not violate the Fifth Amendment.

That cooperative associations of producers are in a class different from ordinary commercial corporations is implicit in the decision in *In re Marketing Association of Fort Wayne, Inc.*, 8 F. (2d) 626, where it was held that an association "engaged chiefly in promoting, fostering, and encouraging the marketing of dairy products cooperatively" one of the principal objects of which was "to prevent speculation, stabilize the market, and handle co-operatively and collectively the problems of dairy products" is not a "moneyed business or commercial" corporation within the meaning of the Federal Bankruptcy Act.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, a state statute imposed a license tax upon persons and corporations refining sugar and molasses but exempted planters and farmers grinding and refining their own sugar and molasses.[40] In sustaining the Louisiana statute, the Court said (p. 95) "The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business the

[40] The Court pointed out that "Congress too has repeatedly acted upon the principle of the Louisiana Statute," and referred to the Act of Congress of August 2, 1813, which imposed a tax on retailers of wines and spirits but exempted "vine dressers who sell at the place where the same is made, wine of their own growth," indicating that such a classification was reasonable.

equal protection of the laws." Exemptions accorded to producers organized into associations do not differ in principle from the exemption granted in the Louisiana statute in favor of individual farmers.

The validity of a Kentucky statute similar to the Capper-Volstead Act was sustained by this Court in *Liberty Warehouse Co.* v. *Burley Tobacco Growers Cooperative Marketing Association*, 276 U. S. 71.

The only case in which this Court has held a discrimination in favor of cooperative associations to be unconstitutional is *Frost* v. *Corporation Commission*, 278 U. S. 515. In that case, an Oklahoma statute which required a showing of public necessity as a prerequisite to the granting of a license to engage in cotton ginning provided that a license should be granted without such a showing upon the petition of 100 citizens and taxpayers for the establishment of a gin to be operated cooperatively. The Court held that a cooperative association formed as a stock corporation under an Oklahoma statute which permitted such corporations to be composed in part of persons other than farmers, to make profits, and to declare dividends, was not sufficiently different from ordinary business corporations to sustain the different treatment provided for by the statute. The court indicated, however (p. 523), that its objection was on this ground alone and would not have applied to an association not for profit, organized without capital stock and restricted to the business of its own members except the selling of products of and buying

of supplies for nonmembers as agent, subject to a limited liability of the nonmembers for the obligations of the association "such services to be performed at the actual cost thereof, including a pro rata part of the overhead expenses" (278 U. S. 523). The cooperative associations involved in this case are nonstock, nonprofit associations.

Moreover the dissenting opinion of Mr. Justice Brandeis points out in detail the bases for recognizing even cooperative corporations of the particular type involved in the *Frost* case as a class of business enterprises distinct and different from ordinary business corporations (278 U. S. 535–550).[41]

This recognition of the constitutional validity of legislative treatment of farmers' co-operatives more favorable than that accorded to ordinary business organizations is consistent with established principles recognizing the reasonableness of treating different types of business enterprises differently even though they are in competition. In *State Board of Commissioners* v. *Jackson*, 283 U. S. 527, this Court, in sustaining the constitutionality of a chain store tax, said (p. 537):

> The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain

[41] See also the separate dissenting opinion of Mr. Justice Stone, 278 U. S. 550, 551.

it, *Rast* v. *Van Deman & Lewis Co.* 240 U. S. 342; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. See also *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580.

As this Court pointed out in *Puget Sound Power and Light Co.* v. *Seattle*, 291 U. S. 619, 625, 626:

> The state may tax different types of taxpayers differently even though they compete. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. It could not plausibly be argued that a private nonprofit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. Compare *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 40; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322 * * *. The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the

> way. Legislation may protect from the consequences of competition, but the Constitution does not. * * * It [the Fourteenth Amendment] does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different.

The foregoing cases establish that Congress may accord to producer-owned cooperatives treatment different from that accorded to proprietary handlers and that such a law would be sustained even though it could be shown to be drastically discriminatory in favor of the separate class of cooperative handlers. No evidence in this case, however, discloses that any of the provisions of the Act or the Order have accomplished or threaten the accomplishment of any injury or discrimination to the appellees.

(b) The Provisions Claimed To Be Unconstitutionally Discriminatory Do Not Discriminate in Favor of Cooperatives and Do Not Deprive Appellees of Their Property in Violation of the Fifth Amendment

i. The Exemption of Cooperatives from the Uniform Price Requirement

Under terms of the order (Article VII, Section 1)[42] which are prescribed by the Act (Section 8 (c) (5)

[42] Article VII, Section 1 of the order provides:

"*Time of Payment.*—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from

(F)) [a] all handlers of milk, except cooperative associations of producers, must return to producers from whom they buy milk the uniform price established under the order; whereas producers who sell their milk through cooperatives may receive back from the cooperatives less than that amount as their share of the net proceeds of the pooled milk handled by the cooperative. The appellees claim that this provision results in an unreasonable discrimination against handlers which are not cooperatives and results in the property of such handlers being taken in violation of the Fifth Amendment and transferred to producers who sell through cooperatives. The

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producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made."

[a] Section 8c (5) (F) of the Act provides:

"Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

alleged taking is said to occur in various ways. All are merely slightly varying consequences of this exemption. The following are typical:

First, it is said that the mere fact that cooperatives may return to producers less than the uniform price enables them to sell milk at lower prices than the proprietary handlers can accept without loss if they pay the class prices.

Second, it is said that, because cooperatives may return to producers less than the uniform price, they are free to deduct from the amount paid to the producers certain expenses of plant operation and certain transportation costs; whereas proprietary handlers may not throw these expenses back upon the producers from whom they buy but must either bear the expenses themselves or pass them on to their customers in the form of competitively disadvantageous, higher prices.

These complaints retain a semblance of plausibility only as long as the essential differences between proprietary handlers and cooperative associations of producers which are also handlers, remain obscured. But vital differences are apparent, and, once recognized, the reasonableness of the exemption becomes apparent. The differences most significant with respect to this particular claim of discrimination rest upon the dual relationship of producers to the cooperatives.

Cooperative handlers are composed of producers. These producers share any income of the cooperative

enterprise, as well as any services it renders. Although they are owners of the handling enterprise, they also supply the milk it handles. Consequently, while they are concerned with what they receive as proceeds of the handling operation, they are more concerned with what they receive for the milk they produce and sell through the cooperative. The owners or stockholders of proprietary handlers, on the other hand, are not milk producers. As owners or stockholders in the distributing enterprise, they have no interest in enhancement of producers' returns. On the contrary, by the nature of their business, they must seek their income solely from the spread between the price paid to producers and that collected from those to whom they sell. The immediate income of such a business is enhanced as the amount paid to the producers is diminished.

Moreover, producers who sell through cooperatives must necessarily share the costs of the enterprise of distribution as well as its services and net returns, whereas producers who sell through proprietary handlers neither directly share the costs of the distributive operation nor share its returns. They merely sell their milk for a price. Furthermore, producers who sell to proprietary handlers have no voice, even indirectly, in the determination of the selling policies of such handlers, or in the determination of what operating costs shall be incurred or what prices shall be paid or received for milk by the handlers. Those who sell through cooperatives do have a voice

and an interest in these matters as members of the handling organization.

The exemption of cooperatives from the necessity of returning the uniform price to producers is merely a reasonable recognition of these differences.

Doubtless it will be said, however, that despite these differences between cooperative handlers and proprietary handlers, and despite the reasonableness of classifying and treating them differently, the difference in treatment required by the Act gives the cooperatives an insurmountable advantage in competition with the proprietary handlers and is therefore arbitrarily unreasonable—that the provision is, as the court below said (R. 769) "* * * more like a case of statutory disarming of one set of competitors and sending (sic) into competitive battle with another set to whom the same statute supplies arms."

But the effect of the Act and the order is only to force the proprietary handlers to compete on an equal basis with the cooperatives. The only weapons of which they are deprived are those offensive weapons (such as the freedom to throw expenses or competitive losses of their proprietary operations back onto the producers in the form of reduced prices), by the use of which, in the past, they have persistently disrupted interstate commerce in milk destined for the New York market and depreciated prices to producers selling into that market. The provision requiring proprietary handlers to pay the

uniform price is essential if such results are to be prevented.

The mere fact that the terms of the Order do not require cooperatives composed of producers to return the uniform price to their members does not, as the appellees would have it appear, relieve cooperatives of the necessity of returning the equivalent of that price. With the Order in effect producers can get the uniform price in cash from any complying proprietary handler. This requirement sets a standard by which producers may judge the adequacy of the return they get for their milk, whether they sell it to a proprietary handler or through a cooperative. Any cooperative adopting a policy of presistently dropping retail prices materially below those of the proprietary handlers, and throwing back upon the participating producers either excessive operating costs or losses resulting from price cutting or other sales policies, would quickly destroy itself. Unless the net value of the services and returns rendered to producers selling through cooperatives at least equal the uniform price which they can get from proprietary handlers under the Order, there is no reason for them to sell through cooperatives. There is no reason to suppose that any producer would continue to accept, through a cooperative, returns smaller than those he could get from proprietary handlers, merely in order to achieve the barren satisfaction of having cooperatives sell larger quantities of milk for less money. His interest lies in getting the best available return from his milk. Obviously no cooperative could long survive

without returning to producers at least the equivalent of the uniform price. The self-interest of the cooperative's members would either force a change of policy, or cause them to abandon the cooperative."

Thus when the appellees' contention is considered more than superficially, it is evident not only that the different treatment accorded to cooperatives does not result in any real discrimination in favor of cooperatives but also that no requirement that cooperatives return uniform prices to their producers is necessary to assure all producers net returns equivalent to the uniform price.

Furthermore, there is no evidence in this case to show that the appellees, or any proprietary handlers, have been damaged or would be damaged by competing with cooperatives on the equalized basis enforced by the Act and Order. See *infra*, pp. 176-182. Without such proof there is no basis for a finding that the order deprives them of property without due process of law. *Hegeman Farms Corp.* v. *Baldwin et al. supra*, 170; *Public Service Commission of Montana* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447.

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[44] The affidavit of E. W. Gaumnitz (R. 257, 272) sustains this conclusion. There is no evidence in the record contradicting it. The fact seems too obvious to invite contradiction.

ii. The Exemption of Milk Sold Outside the Marketing Area From the Minimum Price Requirement Does Not Deprive the Appellees of Property in Violation of the Fifth Amendment to the Constitution

The appellees claim that the order discriminates against them because it does not require that the Class I prices fixed by the Order be paid for fluid milk sold outside the marketing area. The contention seems to be that this results in an advantage to handlers who sell outside the area not only because they are free to pay less than the Class I price for such milk and thereby to reduce the average price paid for all the milk they handle but also because milk sold outside the marketing area, particularly in New Jersey, brings a higher price than that sold within the marketing area. It is asserted that the profits from such sales are available to such handlers as a back-log which enables them to undersell the appellees in the marketing area. It is claimed that these circumstances result in taking the appellees' property in violation of the Fifth Amendment and transferring of it to those handlers who sell outside the market.

It is obvious that any blending of the prices paid for milk sold outside the marketing area with the price paid for milk in the area could not discriminate in favor of cooperatives as such, for the cooperatives are not required to pay the uniform price even for milk sold within the market. The complaint therefore is not peculiar to cooperatives. If the provision

could have any discriminatory effect at all, it would operate only in favor of proprietary handlers selling milk outside the marketing area.

Moreover as has been pointed out *supra*, pp. 48-60, there is no evidence that this provision is unreasonable or discriminatory in any respect. It is well established that facts supporting the reasonableness of the statute will be presumed to exist until the contrary is shown by affirmative evidence. *United States* v. *Carolene Products Co.*, 304 U. S. 144. The burden is upon the one attacking the statute to show that it is unreasonable or discriminatory. *Aetna Insurance Co.* v. *Hyde, supra; Public Service Commission* v. *Great Northern Utilities Co., supra.* The appellees have completely failed to sustain that burden on this point.

D. THE LOWER FEDERAL COURTS HAVE ALMOST UNIFORMLY UPHELD THE CONSTITUTIONALITY OF THE ACT AND THE VALIDITY OF ORDERS ISSUED PURSUANT THERETO

The lower federal courts have, with only one exception [45] aside from the decision of the District Court in the case at bar, upheld the constitutionality of the Act and the validity of orders issued pursuant thereto.

Three circuit courts of appeals have had occasion to pass upon the constitutionality of the Act and

[45] The only unreversed district court case holding such orders invalid is *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152 (S. D. Fla.), which, in effect, has been overruled by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Henry E. Whittenburg et al.* v. *United States*, 100 F. (2d) 520.

orders issued by the Secretary of Agriculture pursuant thereto.

In *Edwards* v. *United States*, the Circuit Court of Appeals for the Ninth Circuit, on July 22, 1937, in a unanimous decision, reported in 91 F. (2d) 767, upheld the constitutionality of the Act and the validity of an order regulating the handling in interstate commerce of citrus fruit grown in California and Arizona. The order in that case provided for proration and allotment of shipments of citrus fruit in interstate commerce and, therefore, differs in the form of regulation from Order No. 27; but the restraint upon the freedom of the handler to ship freely in accordance with his contracts in the terminal markets was probably more onerous in its effect upon the handler than the regulatory provisions of Order No. 27 and was just as vigorously attacked as violating the due process clause of the Fifth Amendment as are the provisions of Order No. 27 in the case at bar.

In *Wallace* v. *Hudson-Duncan & Co.*, 98 F. (2d) 985, the same Circuit Court of Appeals again upheld the Act and sustained the validity of an order regulating the shipment in interstate commerce of walnuts grown in California, Oregon, and Washington.[46]

In *United States* v. *David Buttrick Company et al.*, the Circuit Court of Appeals for the First Circuit, in a unanimous opinion on July 16, 1937, reported in 91 F. (2d) 66 (certiorari denied, 302 U. S. 737), held that

[46] The opinion of the District Court, *Hudson-Duncan & Co.* v. *Wallace*, 21 F. Supp. 295, upheld the statute but declared the order invalid as a denial of due process.

the marketing provisions of the Act were a valid exercise of the power of Congress under the commerce clause. The order in that case regulated the handling of milk shipped in interstate commerce to Boston, and the decision of the District Court of Massachusetts (Brewster, J.), 15 F. Supp. 655, dismissing the bill of complaint filed by the Government to enforce compliance with the order, was reversed by the Circuit Court of Appeals. It is true that only two questions were before the court for decision, namely: (1) whether the decision of this Court in *United States v. Butler*, 297 U. S. 1, invalidated the marketing provisions of the Agricultural Adjustment Act, as amended August 24, 1935, and (2) whether such marketing provisions were, upon the face of the Act, a valid exercise of the powers of Congress to regulate interstate commerce.

In *Henry E. Whittenburg et al.* v. *United States*, the Circuit Court of Appeals for the Fifth Circuit, on December 15, 1938, in a unanimous decision reported in 100 F. (2d) 520, upheld the constitutionality of the Act and the validity of an order regulating the handling in interstate commerce of citrus fruit grown in the Lower Rio Grande Valley. The order in this case was similar to the order involved in *Edwards v. United States*, *supra*.

In twelve districts, widely separated and representing nearly every section of the country, the district courts have enforced orders issued by the Secretary pursuant to the Act. In all, twenty-four di

trict judges have issued restraining orders or injunctions requiring compliance with orders issued pursuant to the Act. Some of these cases have proceeded no further than the preliminary stages and are unreported, but in a number of them the opinions or findings of fact and conclusions of law of the court have been reported. A representative case from each of the twelve districts mentioned above is cited in the footnote hereto.[47] In five of these cases the order involved was an order regulating the handling of milk.[48]

Only three federal judges, aside from the District Court in the instant case, have held against the stat-

[47] *United States* v. *Edwards* (S. D. Cal., Yankwich, J.), 16 F. Supp. 53; *United States* v. *Buckley*, (N. D. Cal., St. Sure, J.), unreported; *United States* v. *Goldsmith Fruit Co.* (S. D. Fla., Holland, J.), 19 F. Supp. 147; *United States* v. *Corinth Creamery, Inc.* (D. Vt., Howe, J.), 21 F. Supp. 265; *United States* v. *Whiting Milk Co.* (D. Mass., Sweeney, J.), 21 F. Supp. 321; *United States* v. *Whittenburg et al.* (S. D. Tex., Atwell, J.), 21 F. Supp. 713; *United States* v. *Krechting* (S. D. Ohio, Druffel, J.), unreported. *United States* v. *Wiggins* (E. D. N. C., Pollard, J.), unreported; *United States* v. *Bland* (S. D. Ga., Barrett, J.), unreported; *United States* v. *Morris* (S. D. S. C., Myers, J.), unreported; *United States* v. *Babcock Dairy Co., et al.* (N. D. Ohio, Kloeb, J.), unreported; *United States* v. *Beranek* (W. D. Mich., Raymond, J.), unreported.

[48] *United States* v. *Corinth Creamery, Inc., supra; United States* v. *Whiting Milk Co., supra; United States* v. *Krechting, supra; United States* v. *Babcock Dairy Co., et al., supra; United States* v. *Beranek, supra.*

ute. Two of these have been reversed,[49] and the opinion of the third has, in effect, been overruled.[50]

II. The Validity of Order No. 27

A. THE DISTRICT COURT ERRED IN HOLDING THAT SECTIONS 5 AND 6 OF ARTICLE VII ARE NOT AUTHORIZED BY THE ACT

Section 5 of Article VII provides for payments to cooperative associations to compensate them for the expenses which they incur in conducting their operations so as to supply Class I milk to the marketing area in times of short supply, and to secure the utilization of milk in times of long supply in such a manner as to assure the greatest possible returns to all producers.

Section 6 of Article VII provides for certain payments to handlers to compensate them for the expenses incurred in transporting milk, received at a fluid plant during any period of the year except the short season, to a manufacturing plant where it is utilized in the higher manufacturing classes, and in shipping fluid milk to the marketing area from a manufacturing plant during the short season.

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[49] *United States* v. *David Buttrick Company et al.*, 15 F. Supp. 655, reversed, 91 F. (2d) 66, certiorari denied, 302 U. S. 737; *Ganley* v. *Wallace*, 17 F. Supp. 115, reversed, 95 F. (2d) 364.

[50] *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152. See *Henry E. Whittenburg et al.* v. *United States*, 100 F. (2d) 520 (Plaintiffs in this case sought to restrain the enforcement of the Florida citrus order, and the opinion was rendered on a motion to dismiss. Before the case could be reached for trial on the merits, it was dismissed by the plaintiffs.)

The appellees attacked these payments as being discriminatory, but it was not alleged in the answers nor claimed at the trial that these provisions of the order are not authorized by the statute. This issue was raised for the first time by the court in its opinion dismissing the complaints, in which it said (R. 772):

> It is urged that no provision of the statute authorizes Article VII, Sections 5 and 6, of the order. * * * The Court does not find any sections of the Act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced.

The conclusions of law submitted by appellees and adopted by the court do not state that the provisions of Sections 5 and 6 of Article VII of the Order are not authorized by the Act. It is therefore not entirely clear whether the District Court intended the foregoing language in its opinion as a definite holding that such provisions are unauthorized. If it should be so construed, we submit that such holding is erroneous.

1. Appellees Have no Legal Standing to Complain of the Provisions of Article VII, Sections 5 and 6 of Order No. 27

Before issuing Order No. 27, the Secretary conducted a hearing and complied with all the applicable provisions of the Act (R. 250–254). The Order was published in the Federal Register (R. 252), and there is a presumption that it was duly issued, prescribed and promulgated (49 Stat. 502, 44 U. S. C., Supp. IV, § 307). *United States* v. *Chemical Foundation*,

272 U. S. 1, 14. The answers filed by the several appellees do not allege that these provisions of the Order are not authorized by the Act. Since a lack of authority in the Act for these payments would clearly be an affirmative defense, it follows that the issue was not before the District Court, and that the court erred in passing on the question.[51]

But even if the issue had been pleaded, appellees have no legal standing to attack these provisions. The purpose and effect of the payments to cooperative associations is to distribute equitably among producers the cost of services which result in a higher uniform price to all producers. These payments are simply one feature of the distribution of the burden of the surplus milk among all producers. The payments out of the Producer Settlement Fund do not affect the price which the appellee Jetter Dairy Company, Inc., must pay for its milk. The fact that these payments may inure to the benefit of a cooperative association which is a competitor of this appellee, in some of its operations, gives it no standing to complain of such payments.[52] Nor does the possibility that these payments may reduce the amount which might be distributed to some producers who are not organized as cooperatives give the appellees any standing to complain. Having shown no injury to themselves they cannot base a constitu-

[51] Rule 8 (c), Federal Rules of Civil Procedure. *Southern Railway Company* v. *King*, 217 U. S. 524; *Horn* v. *Detroit Dry Dock Company*, 150 U. S. 610; *Millbank* v. *Jones*, 127 N. Y. 370.

[52] *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Currin* v. *Wallace*, decided January 30, 1939.

tional objection on the ground that the payments to some producers might be diminished.[53]

Nor have the other appellees any standing to complain of such payments. All of the other appellees are cooperative associations. There is no showing in the record that they cannot qualify to receive cooperative payments. Since this provision of the Order is designed for the benefit of these appellees, it follows that they cannot be heard to complain of its alleged invalidity.[54]

Nor have any of the appellees any standing to complain of the market service payments authorized by Section 6 of Article VII. These payments do not affect the cost to the appellee Jetter Dairy Company, Inc., of its milk. Like the cooperative payments they are paid out of moneys due to producers. Furthermore, all of the appellees are eligible to receive market service payments. None of the appellees have manufacturing facilities except that the appellee Jetter Dairy Company, Inc., separates some cream at its Solsville plant, but it is not necessary to have manufacturing facilities to receive market service payments. If any of the appellees had so desired they might have moved any milk that could not readily be sold as fluid in the marketing area to the Solsville plant of the Jetter Dairy Company, where it could have been converted to cream.

[53] See *Aetna Insurance Co.* v. *Hyde*, *supra*, p. 446, where this Court pointed out that "Companies whose constitutional rights are not infringed may not better their position by urging the cause of others."

[54] *Cusack* v. *City of Chicago*, 242 U. S. 526.

Each would have been reimbursed for his outlay in receiving and hauling this surplus milk to a point where it could be economically utilized. Since this provision of the Order is for the benefit of all appellees, they cannot be heard to complain of its alleged invalidity.[55]

2. The provisions of Article VII, Sections 5 and 6, of Order No. 27 are authorized by the Act

Section 8c (5) (B) provides that in the case of milk and its products, an order may contain a provision for payment to all producers and associations of producers delivering milk to all handlers, of uniform prices for all milk so delivered irrespective of the use made of such milk by the individual handler to whom it is delivered, subject * * * [to] "(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time." (Appendix A, p. 4) Section 8c (7) (D) provides that orders may contain provisions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." (Appendix A, p. 7.)

Both the cooperative payments and the market service payments are authorized by Section 8c (7) (D) of the Act, and the cooperative payments are also authorized by Section 8c (5) (B) of the Act.

[55] *Cusack* v. *City of Chicago*, 242 U. S. 526.

The cooperative payments provided for by Section 5 of Article VII are limited to cooperative associations which have their activities entirely under the control of their members, and which exercise full authority in the sale of the milk of their members and make use of that authority so as to supply Class I milk to the marketing area in times of short supply and to secure the utilization of milk in times of long supply in such a manner as to assure the greatest possible return to producers. The Secretary determines whether a cooperative association is qualified to receive these payments by reason of performing such services for the market and the payments continue until the cooperative is disqualified for failure to perform such services.

Since the ability of a cooperative association to perform the services specified in Section 5 varies in accordance with the control which it exercises over the milk of its members, the payments authorized by this section also vary accordingly. A cooperative which is merely a bargaining cooperative can qualify to receive one cent per cwt. on the milk delivered by its members. A cooperative which also reports and collects for the milk of its members exercises a greater degree of control over such milk and can qualify to receive 2½ cents per cwt. A cooperative association which operates its own plants is in a position to exercise full control over the milk produced by its members and can qualify to receive 5 cents per cwt. on the net pooled milk at such plants and, if, in addition to the other qualifications, it has

sufficient plant capacity to receive all the milk of its members and is also willing and able to receive milk from producers who are not members, 5 cents per cwt. on any net pooled milk delivered to another handler, which is reported and collected for by the cooperative.

A cooperative association which qualifies to receive these payments obligates itself to perform the services specified in Section 5. The services performed by cooperatives in return for these payments are two-fold: The first relates to the supplying of Class I milk to the marketing area in times of short supply. A cooperative which qualifies under Section 5 obligates itself to supply all its milk to the marketing area as Class I milk during times of short supply, even though this involves some disruption of its operations and added expense as would happen, for example, if a cooperative association having its plant equipped for making condensed milk, and having a favorable market for the sale of this product should suspend the manufacture of condensed milk in order to augment the supply of Class I milk in the marketing area.

The second obligation assumed by the cooperative association is to utilize its milk in times of long supply in such a manner to insure the greatest possible return to producers. In order to meet its obligation in this respect, a cooperative having manufacturing plants, for example, would have to utilize surplus milk in the higher manufacturing classes in order to increase the return to producers even though, in the

light merely of cost and selling price, it would be more profitable under the existing conditions to utilize milk in one of the lower manufacturing classes.

The proprietary handler could not be expected to perform these services, since, from the nature of their business, proprietary handlers are interested only in the spread between the purchase price and the sale price of milk. A cooperative association on the other hand is interested in securing the highest possible return for its members (R. 257–259, 272). However, since a cooperative association must account to the pool at the class prices, the utilization of milk in the higher classes, while it increases the net return to all producers, imposes a burden on the members of the cooperative if the market for milk in such classes is unfavorable. The payments authorized by Section 5 are designed, in part, to compensate cooperative associations for the losses which they incur in utilizing milk so as to secure the highest possible net return to producers, and therefore such payments are necessary in order "equitably to apportion" the total value of milk among all producers.

Another service which cooperatives perform for the market is the maintenance throughout the year of facilities for handling the seasonal surplus even though these facilities can be employed only during the flush season. The proprietary handler will not maintain manufacturing facilities unless they can be utilized sufficiently to return a profit on his manufacturing operations. The maintenance of such facilities involves substantial expense to the cooperatives,

and since this expense inures to the benefit of all producers it is equitable that those who bear this expense should be recompensed through the cooperatives (Ex. 3 to stip. R. 269, Tr. 5597, Ex. 22 to stip. R. 273, 482).

Cooperatives also perform a service for the market by using their efforts during the flush period of production to secure the utilization in fluid form of milk near to the market and the utilization in manufactured form of milk produced at the edge of the milkshed, thereby reducing the transportation charges which must be shared by all producers.

The performance of the services outlined in the foregoing paragraphs results in substantial expense to the cooperatives. Since such expense must be reflected in the return to its producers it would be difficult, if not impossible, for a cooperative to continue to perform these services without compensation. Since these services are necessary to insure the efficient operation of Order No. 27 it follows that the payments to cooperatives are not only necessary "equitably to apportion" (Section 8c (5) (B) of the Act) the total value of milk among all producers but are also "necessary to effectuate the other provisions of such order." (Section 8c (7) (D) of the Act.)

There is no evidence that the payments authorized by Section 5 of Article VII are unduly high. It would seem evident that they are not from the fact that the League has received such payments (Dfts. Ex. 46 R. 360, 674) but has nevertheless been unable to return the full uniform price to its producers each

month (Dfts. Ex. 11, 12 R. 331, 654–655; Dfts. Ex. 54 R. 364, 677). There was substantial evidence before the Secretary to support his determination as to the necessity for such payments.

The market service payments which are authorized by Section 6 of Article VII are likewise necessary to insure the efficient operation of Order No. 27 and are therefore "necessary to effectuate the other provisions of such order" and there was substantial evidence before the Secretary to support his determination as to the necessity for such payments (Ex. 3 to stip. R. 269, Tr. 5174).

Since the prices fixed in the various manufacturing classes represent the approximate value of milk utilized in such classes (Pl. fg. 13 (A) R. 173, 174) there is no reason to suppose that a handler could ever dispose of his surplus milk to another handler having manufacturing facilities at a price sufficiently greater than the class prices announced by the Market Administrator to cover the expense of the transfer. Since the handler who receives the milk from producers must account to the pool for the milk at the class price, he could not be expected to handle the milk and transfer it to a manufacturing plant unless the Order contained some method whereby he could be reimbursed for the expenses so incurred.[56]

[56] Let it be assumed, for example, that during the month of September, handler "A" received large quantities of milk in excess of the amounts necessary to meet his own requirements. Handler "B" operates a plant equipped for handling milk in Class III–D, 10 miles from handler "A's" plant. The Class III–D price for September was $1.01 (Dfts. Ex. 39 R. 359, 669). If handler "A" sold his milk to handler "B" at the

The market service payments merely provide such reimbursement. The only witness who testified as to the price received for milk on which he collected market service payments testified that he sold the milk at 5¢ over the class price and that this was his profit on the transaction (R. 355). It should be noted also that market service payments can be earned only on milk manufactured in the higher classifications so that these payments tend to increase the net return to producers.

B. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE SECRETARY SUPPORTING ALL THE FINDINGS OF THE SECRETARY AND ALL THE TERMS AND PROVISIONS OF ORDER NO. 27

1. The Determination of the Secretary as to Producer Approval of Order No. 27

To determine whether Order No. 27 was approved or favored by at least two-thirds of the producers producing milk for sale in the marketing area during the month of May 1938, which period he had determined to be a representative period, the Secretary

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class price or a few cents over the class price he has incurred a substantial loss on the operation unless he can be reimbursed for the expenses incurred in diverting the milk. The average cost of handling milk at a country plant is 15¢ to 30¢ per cwt. (R. 401). If we assume that handler "A" operates with average efficiency, his handling cost is 23¢ per cwt. The trucking allowances contained in Section 6 represent the average cost of trucking milk (Dfts. Ex. 78, R. 395, 741). Therefore, the net cost of the milk per cwt. to handler "A" would be 23¢ for handling plus 5¼¢ for trucking, plus $1.01, the price at which he must account to the pool for the milk, or a total of $1.29¼¢. If he sold the milk to handler "B" at the class price, his net loss would be 28¼¢. To avoid this loss he has no alternative but to refuse to accept the milk from producers unless he can obtain reimbursement (R. 358).

conducted a referendum pursuant to Section 8c (19) of the Act. The results of this referendum were as follows: 45,644 votes cast, of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes or 87.1% were in favor of the issuance of Order No. 27, and 4,964 votes or 12.9% were opposed thereto. Of the 7,017 votes which were rejected, 6,547 were rejected either because the voters were members of cooperative associations which had cast ballots for all of their members, or because the voters were not qualified to vote, not having delivered milk to an approved plant during the month of May 1938. Of the votes rejected for these reasons, 5,110 were in favor of the issuance of the order, and 1,437 were opposed thereto. 470 votes were rejected because the voters had failed to mark the ballot, or because it was not possible to determine whether the ballot was marked for or against the Order (R. 253, 269).

Copies of the Order and of pamphlets explaining the Order were sent to all producers in the milkshed who might be eligible to vote (R. 253). The full text of the Order was published in the Dairymen's League News (Ex 24E to stip., R. 274, 574), and The Dairy Farmers Union (Ex. 27 to stip., R. 274, Tr. 9420). The order also received wide discussion, both favorable and unfavorable, among papers having a wide circulation among dairy farmers (Exs. 23 to 23H to stip. R. 274, 511–555, Exs. 24 to 24G to stip R. 274, 555–593, Ex. 27 to stip. R. 274, Tr. 9415–9422). There was every opportunity for producers

to acquaint themselves with the provisions of the Order. The principles underlying the Order were familiar to producers as similar plans had been utilized by the League and Sheffield Producer Co-operative as a means of making distribution to their own members (*supra* p. 45), and a classified-price plan had been in effect in the State of New York under New York State Milk Control (Gov. Ex. 3 to stip. R. 269-7515). Section 8c (19) of the Act specifically provides that "the requirement of approval or favor shall be held to be complied with if the percentage of the total number of the producers represented in the referendum approving or favoring is equal to or in excess of the percentage required under the applicable provisions of the Act." Certainly, in these circumstances, the favorable vote of producers constituted substantial evidence before the Secretary to support his determination that the issuance of the Order was approved or favored by at least two-thirds of the producers who during the month of May 1938, were engaged in the production of milk for sale in the marketing area.

2. *The Findings of the Secretary as to the Reasonableness of the Terms and Conditions of Order No. 27*

As stated by this Court in *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 69:

> It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise.

In the present case, it is not necessary to rely on this presumption. There was substantial evidence before the Secretary to support all the terms and conditions of Order No. 27, and the District Court so found (R. 171). A summary of much of the relevant evidence is contained in appellant's proposed findings 12 and 13 (R. 171–177). These findings are discussed, *supra*, at pp. 64–65.

C. THE DISTRICT COURT EXCEEDED ITS POWERS WITH RESPECT TO ITS JURISDICTION TO REVIEW ADMINISTRATIVE FINDINGS AND DETERMINATIONS MADE BY THE SECRETARY

The Determination of the Secretary as to Producer-Approval of Order No. 27

The District Court found that, of the valid votes cast by producers in the referendum conducted by the Secretary on the proposed Order No. 27, approximately 87 percent were in favor of the Order (R. 253, 269). If the rejected votes had been counted this would not have changed the result materially (R. 253, 269). Nevertheless, the District Court set aside the determination of the Secretary that Order No. 27 was approved by at least two-thirds of the producers, on the ground that such finding "is unsupported by substantial probative evidence and amounts merely to an expression of opinion by the Secretary" (R. 165). The court also found as a fact that the finding of the Secretary that the order was approved or favored by at least two-thirds of the producers who voted in the referendum "was unsupported by any substantial evidence, and said referendum determined only that many of the producers voting therein favored an

Order which required equal payments to all producers, and payment of the same price for milk by all handlers. The inference to be drawn from such vote was that such producers did not favor or approve an order which exempted large handlers from payment of the uniform price to their producers, and which did not require equal prices to be paid by all handlers but, on the contrary, permitted certain large handlers to pay reduced prices for their milk supply" (R. 150).

Clearly, the court arbitrarily substituted its judgment for that of the Secretary. There is not a shred of evidence showing that any producer misunderstood the Order, and it is conceded that prior to the referendum a copy of the Order was sent to every producer who might be eligible to vote (R. 253).

The requirement that the Secretary determine that the issuance of an order is approved or favored by at least two-thirds of the producers is not a constitutional guarantee, but was imposed by Congress, and Congress, having imposed the requirement, could specify what would satisfy it.[57] This, Congress has done in Section 8c (19) of the Act, by providing that:

> * * * The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. * * *

[57] *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 184.

By this section Congress has instructed the Secretary that, if he elects to conduct a referendum and if the producer vote is favorable he need make no other investigation as to whether producers actually approve or favor the order, but may accept as final the approval expressed in the referendum. The requirements of the statute were fully satisfied in the case. (See *supra* pp. 34–39.) Appellees assert that the Secretary should have disregarded the express directions of Congress because of alleged misrepresentation as to the terms of the Order.

In every election or referendum statements are made by those favoring and opposing the particular candidates or issues involved, and the suggestion is novel that the court should investigate the utterances of every partisan to determine whether there has been any misrepresentation as to the issues involved. (See *Denton* v. *Pulaski County*, 185 S. W. 481; *Applegate* v. *Eagan*, 74 Mo. 258.)

The evidence supporting the Secretary's determination is outlined *supra*, pp. 164 to 166. There is no evidence that this determination was not correct. The evidence upon which appellees rely is that the Secretary sent out a pamphlet to all producers stating that the marketing program is designed, among other things,

> * * * to assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk was sold or the use made of the milk by the individual handler.

Similar statements were made by the Bargaining Agency and the League. As pointed out, *supra*, p. 46, the alleged falsity of this statement is based on a fine-spun legal argument which, in turn, is based on a wholly fallacious premise. This argument presupposes that the interests of a cooperative association are adverse to the interests of its producers; that it is to the interests of a cooperative association to return a lower price to its producer-members, and that the relationship of a cooperative association to its producers is identical with the relationship of a proprietary handler. Cooperatives are owned by and composed of producers. As participants in the cooperative they share both the returns it realizes from milk sold and the costs it incurs in handling and selling the milk. Accordingly the amount they ultimately receive from the enterprise is neither the gross receipts for the milk nor, as would be the case if they sold to a proprietary handler, merely a price for their milk, but the net income of the cooperative enterprise after the costs of its services have been prorated among them. This method of operation was widely known. Obviously the quoted statement in the pamphlets did not refer to the division of the net proceeds of cooperative operations.[58] Furthermore, even if there were any reasonable likelihood that this description might have been construed by producers to refer to cooperatives, the

[58] It cannot be supposed that producers would have understood this statement as meaning that cooperatives must return the uniform price each month, and there is no evidence that a single producer so understood it.

practical effect of the order in operation as has been pointed out above, pp. 144–148, is to require the cooperatives as well as the proprietary handlers to return to the producers the equivalent of the uniform price.

Since the finding of the Secretary as to producer-approval of the Order was a finding of fact, the Secretary's determination is final, if supported by substantial evidence.[59] That such finding was supported by substantial evidence is established, *supra*, pp. 164–166. But, even though the court below were not in error in passing on the weight of the evidence, we submit that the foregoing discussion demonstrates that its finding that the Order was not approved or favored by the requisite percentage of producers not only completely disregards the presumption of validity which attaches to the Secretary's determination[60] but has no support in the evidence.

2. The Findings of the Secretary as to the Reasonableness of the Terms and Conditions of Order No. 27

Before promulgating Order No. 27, the Secretary conducted hearings at c nveniently located places throughout the milkshed. These hearings were attended by producers, representatives of producers, handlers and consumers of milk sold in the marketing

[59] *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479; *Johnson* v. *Drew*, 171 U. S. 93; *Douglas* v. *Noble*, 261 U. S. 165; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Shields* v. *Utah Idaho Central R. Co.* 305 U. S. 177; 187.

[60] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304.

area, and all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed Order. All of the appellees knew of the hearings, but none of the appellees appeared or were represented at any hearing (R. 251, 269). At these hearings substantial evidence was introduced in support of all the terms and conditions of Order No. 27, and in support of the reasonableness of such terms and conditions. The District Court so found (R. 171, 191), but refused to find that all the terms and conditions of the Order were reasonable. The court found that a number of the terms and conditions of the Order were discriminatory as against the appellees and, substituting its judgment for the judgment of the Secretary, held that these alleged discriminations render the Order invalid.

An administrative remedy being provided by Section 8c (15) of the Act, appellees have no standing to attack the reasonableness of the terms and conditions of the Order without having first exhausted that remedy. Appellees knew of, and had an opportunity to be present at, the hearing before the Secretary (R. 251, 269), but did not avail themselves of this opportunity. Having failed to do so, they should be required to comply with the Order until such time as they choose to use their administrative remedy and present their grievances to the Secretary.[61] The purpose of administrative review is to provide an opportunity for administrative correction

[61] *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163.

of errors.[62] To permit appellees to secure a review of the reasonableness of the terms and conditions of the Order without first having exhausted their administrative remedy would, as stated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (at p. 50):

> * * * in effect substitute the District Court for the Board [Secretary] as the tribunal to hear and determine what Congress declared the Board [Secretary] exclusively should hear and determine in the first instance.

The Secretary found on the evidence introduced at the hearings that the minimum prices computed as provided in Order No. 27 are prices which will reflect such economic factors as affect the supply and demand for milk and insure a sufficient quantity of pure and wholesome milk. The Secretary also found that the issuance of the Order and all its terms and conditions will tend to effectuate the declared policy of the Act. The District Court found that there was substantial evidence to support all the terms and conditions of the Act. Since the findings of the Secretary are supported by substantial evidence, they were binding upon the District Court and not subject to review.[63]

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[62] *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399.

[63] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Virginian R. Co.* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261.

The formulation of an Order regulating the handling of milk in the New York metropolitan marketing area involves the exercise of sound administrative discretion guided by special skill and knowledge to determine whether the various provisions of the Order, taken not individually but as a whole, will tend to effectuate the declared policy of the Act. The Secretary is peculiarly qualified to make these determinations, and if his determinations are supported by substantial evidence, they are binding upon the courts.

A similar question was before this Court in *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, which was a suit brought to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies subject to the Act. In sustaining the action of the Commission, this Court said (pp. 236–237):

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" (*Kansas City Southern Ry. Co.* v. *United States*, 231 U. S.

> 423, 444) as to be the expression of a whim rather than an exercise of judgment. *Norfolk and Western Ry. Co.* v. *United States*, 287 U. S. 134, 141; * * *.

The cases in which this Court has expressed the same view are numerous.[64]

A similar expression of this principle is found in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, in which this Court said (p. 304):

> * * * Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. * * *[65]

D. IN ITS OPERATION AND EFFECT, ORDER NO. 27 DOES NOT DEPRIVE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

1. The terms of Order No. 27 are not discriminatory as against appellees

It has been pointed out *supra* at pp. 132 to 150 that an appropriate difference of treatment between different classes of handlers in a regulation of inter-

[64] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Virginian R. Co.* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261.

[65] Furthermore, the determination of the Secretary is quasi-legislative in nature. In such cases the discretion of the administrative officer is much broader and the scope of review is narrower than in cases where the determination is quasi-judicial. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186; dissenting opinion of Mr. Justice Cardozo, *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 448.

state commerce is entirely proper, and that, e
though such difference of treatment may result in
crimination against one group of handlers and
favor of another group, such discrimination is not
lative of the Fifth Amendment. Moreover,
analysis of the facts will show that the discriminati
alleged to be inherent in Order No. 27 do not in
exist. As pointed out *supra* at pp. 47 to 48 appel
contend that Order No. 27 contains no less than 7
arate and distinct discriminatory provisions. Th
contentions together with the evidence whic
claimed by appellees to support them and the
dence which demonstrates that no such discrim
tions exist, are discussed *supra* at pp. 48 to 60. T
the District Court exceeded its powers in substitu
ts judgment for that of the Secretary, as to
reasonableness of these provisions, is shown *supr*
pp. 171 to 175.

*2. Appellees Have Sustained No Losses by Re
of the Operation of Order No. 27*

There is no evidence in the record directly es
lishing the cost of operations of any of appelle
the prices which they have received for milk sol
them; there is no evidence in the record which es
lishes that the business of appellees during the pe
that Order No. 27 was in effect has been unprofit
or would have been unprofitable had appellees n
the payments which they were required to mak
the Producer Settlement Fund, and there is no
dence in the record that appellees conduct

businesses with reasonable efficiency. The District Court made no finding that any of the appellees had conducted its business at a loss during this period or that any of them would have conducted its business at a loss had it made its payments to the Producer Settlement Fund. The court did state in its opinion that the appellee Jetter Dairy Company, Inc., was losing from 1¢ to 1½¢ per quart on all milk sold in the marketing area, or an aggregate of $400 to $600 per day, but there is no evidence to support this statement. The District Court found that the reasonable wholesale delivered cost of milk upon the basis of the Class I price was 9¢ to 9¾¢ per quart (R. 187). The court also found that the average minimum delivered cost is 9¾¢ per quart (R. 145). The two findings are inconsistent, and it is submitted that the evidence in the record supports the figure of 9¢ to 9¾¢ per quart, and not the higher figure (R. 324). There is evidence in the record that milk has been sold generally in some sections of the City of New York at prices ranging from 8¢ to 9¢ per quart, but it has not been proved that these prices exist in the areas in which the appellees Central New York Cooperative Association, Inc., and Jetter Dairy Company, Inc., do business. Although the other appellees are handlers as defined in Order No. 27 and handle milk which is sold in the marketing area, the record does not disclose that these appellees sell their milk in the marketing area, and there is no evidence that they are unable to sell milk at a profitable price. Samuel Rootstein testified that a company

having the same stockholders as the appellee Jett Dairy Company, Inc., sold milk in the marketing area at 9¢ per quart (R. 391, 400), but there is no evidence as to the prices at which the appellee Jett Dairy Company, Inc., sold milk. While the evidence might be held to establish that milk has been sold in some areas in New York City at prices which would result in a loss to the average handler, there is no evidence that the operations of the appellees have resulted in a loss. Appellees cannot successfully attack the Order without establishing injury to themselves."[66]

But even if such a loss could be established we submit that the record discloses that it could not be ascribed to the operation of Order No. 27. The theory of appellees is that Order No. 27 contains various discriminatory provisions which make it possible for large cooperatives and those with whom they do business, particularly the Borden Company and the Sheffield Company, to cut prices in the wholesale market in New York City, and that the cutting of prices makes it impossible for the appellees to do business at a profit. The evidence with reference to alleged price-cutting is discussed *supra*, pp. 49–51, 60–61. This evidence establishes that price cutting has been general in certain sections of New York City (R. 320); that it was initiated by some of the so-called independent operators and has been carried on almost exclusively by such independents (R. 320); and that of the three handlers which appel-

[66] *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440.

assert were responsible for the price-cutting, namely, the League, the Borden Company, and the Sheffield Company, only the Sheffield Company has engaged in price-cutting (R. 290); that this handler opposed the Order; that under the Order this company has been required to pay large sums to the Producer Settlement Fund, *supra*, p. 61; and that the League has actually lost a substantial part of its wholesale business because of its unwillingness to engage in price-cutting (R. 400).

No attack has been made upon the reasonableness of the Class I price which has prevailed under Order No. 27, and it has not even been suggested that the Class I price could be lowered without serious hardship to producers. There is no constitutional right to purchase milk at a price which does not represent a reasonable return to the producer.

There is no showing that the price which a handler must receive in order to conduct his business profitably and pay the full class prices is unreasonably high, but the evidence shows that fierce competition among the independent operators has been responsible for the breakdown in prices in New York City (R. 320, 356).

The complaint of appellees is that they are forced to pay the class prices and cannot, in order to assure themselves a substantial profit in their fluid operations, reduce the price to the producer below the level of prices which the Act declares it to be the policy of Congress to establish. Clearly the Secretary would not have been justified in establishing a

fluid price below such level, and clearly also, Order No. 27 is necessary to prevent the price to the producer from falling below such level (Ex. 26A to stip. R. 274, 607).

The only witnesses who testified as to the cause of the breakdown in the market ascribed this breakdown not to competition from handlers who had been granted discriminatory advantages by Order No. 27, and not an unreasonably high order price for fluid milk, but solely to the willingness of certain of the independent handlers to gamble on the possibility that Order No. 27 would not be enforced and that by the simple expedient of reducing the return to the producer they would be able to retain profitably the business acquired by cutting prices (R. 324, 356). It has always been possible in the past for these handlers to pass back to the producer any competitive losses incurred and it could not be expected that a long-standing habit of reckless competition at the expense of the producers would be broken over night.

During the year 1938, milk sold in New York City for as low as 2 quarts for 7 cents (R. 321) and appellees' witness Rootstein testified that the Tribor Milk and Cream Company sold milk at 5 cents per quart (about $2.30 per cwt.) during August 193 (R. 390). Sales of bottled milk to stores at such prices make it impossible to return a reasonable price to the producer. The competitive situation in New York City has undoubtedly become acute because of the conditions above mentioned, but i

lies within the power of the handlers to correct such conditions while the producers are powerless to do so. Order No. 27 is designed to insure a reasonable price to the producer by fixing the minimum cost of milk to all handlers and providing for an equitable distribution of the burden of the surplus. It was not designed to correct competitive conditions in New York City. But we submit that, if Order No. 27 is rigidly enforced, handlers will eventually realize that competitive losses can no longer be passed back to the producer and competitive conditions in the marketing area will right themselves (R. 359).

The appellee Central New York Co-operative Association, Inc., asserts that the operation of the Order deprives it of its property without due process of law because it would be able to return a higher price to its producers if not required to contribute to the Producer Settlement Fund. This argument is based on the fallacious premise that if Order No. 27 had not been in effect during the months of September, October, and November this appellee would have been able to secure for its milk the prices which it actually secured during those months. The evidence in the record does not support such an assumption. As pointed out *supra*, p. 180, milk was sold in New York City for as low as 2 quarts for 7 cents during the year 1938 (R. 321), whereas the lowest price at which milk was shown to have been sold since September 1, 1938, was 8 cents per quart (R. 317, Fg. 63, R. 145). The record discloses that the League was able to return to its producers only $1.27 per cwt. for the month of

August 1938 (Dfts. Ex. 11, R. 331, 654). The record does not disclose the price returned to producers by Central New York Co-operative Association, Inc., during the month of August 1938, but there is no reason to infer that the price returned was substantially higher than the price returned by the League. If all other handlers are required to comply with Order No. 27 while appellee Central New York Co-operative Association, Inc., is exempted so that it can derive the benefits which result from the Order and at the same time avoid the obligations which are imposed thereby, it naturally follows that this appellee can return to its producers a sum higher than the uniform price but there is no basis for the assumption that if the Order had not been in effect it could have done so.

III. The District Court Should Have Granted the Relief Demanded in the Complaints

A. Appellant Should Not Have Been Denied Relief Because of the Alleged Improper Motives of the Proponents of Order No. 27

1. If the Act is constitutional and the Order otherwise valid, the motives of the proponents of the Order are immaterial

The answer of the appellee Jetter Dairy Company, Inc., contains certain affirmative defenses which allege in substance that the Bargaining Agency caused a proposed marketing agreement and order to be presented to the Secretary as part of a conspiracy among the Bargaining Agency, the League, and others, to use the statutes and agencies of the United

States as instruments of "coercion, monopoly, restraint of trade, unfair dealing, and other illegal acts" (R. 91–103). It is asserted that, as part of this conspiracy, the Bargaining Agency and the League issued false propaganda and procured the adoption of Order No. 27 by fraud; coerced handlers into complying with the Order, and persuaded the Secretary to issue an order containing provisions which are discriminatory in favor of the League and other cooperatives belonging to the Bargaining Agency and proprietary handlers which purchase their milk from such cooperatives. Similar allegations are contained in the answers of the appellees Rock Royal Co-operative, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc. (R. 63–76).

Appellant moved to dismiss the affirmative defenses (R. 83, 103, 104), but the District Court overruled appellant's motion (R. 104), and its action in so doing is assigned as error (R. 778). The District Court, over objection of appellant, permitted the introduction of evidence which was intended to establish the alleged conspiracy. It is submitted that the appellant's motion to strike should have been granted, and that the court erred in admitting such evidence.

We have already established that the Act under which Order No. 27 was issued is constitutional in all respects, *supra*, pp. 92–154; that Order No. 27 was issued by the Secretary in strict compliance with the terms of the Act, *supra*, pp. 34–39; that all the terms and provisions of Order No. 27 are authorized by the

Act, *supra*, pp. 158–164; and that the operation of th Act does not deprive the appellees of their propert without due process of law, *supra*, pp. 176–182. I the Act is constitutional and the Order otherwis valid, it follows that the motive of the Bargainin Agency in presenting a proposed order and marketin agreement to the Secretary in no way affects th validity of Order No. 27, and that the evidenc relating to the alleged conspiracy should have be excluded in accordance with the principle stated *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 13 145, that "if the order is justified by a lawful purpos it is not rendered illegal by some other motive in th mind of the officer ~~using~~ issuing it."

That case involved an order issued by the Secr tary of Commerce which was attacked on the grou that despite its statements of legitimate purpose "sprang from illegal motives, namely, to regula and stabilize freight rates for the benefit of carri belonging to steamship conferences, to compel ap lant to join a conference, and to create a monopo in transoceanic shipping"—a claim almost identi with that advanced by appellees in this case. an illegal motive on the part of the Secretary wo not render the Order illegal it follows *a fortiori* th illegal or improper motives on the part of the p ponents of the Order would not have that effect.

The principle enunciated in the *Isbrandts Moller Co.* case, *supra*, that if the power exists and exercised in accordance with law, the courts cann go behind the exercise of that power to determine

motive which prompted its exercise, has been frequently applied by this Court.[67]

2. The evidence does not establish that the proponents of the Order acted from any improper motive

In support of the allegations that the League and the Bargaining Agency proposed Order No. 27 and procured its adoption as part of a conspiracy to secure an order containing provisions which discriminated in their favor, appellees introduced evidence showing that the Dairymen's League actively sponsored and supported the passage of the Rogers-Allen Law (N. Y. Laws of 1937, chap. 383), pursuant to which Official Order No. 126 was issued (R. 374); that the Bargaining Agency presented proposed Order No. 27 to the Secretary (R. 263, 273), and that the Bargaining Agency and the League urged producers to vote for Order No. 27. As the representatives of a majority of the producers in the milkshed, it was natural that they would support any order which they believed to be for the benefit of the producers and no inference as to improper motives can be drawn from this evidence. It is asserted that the articles in the Dairymen's League News and the Milk Producers' Market News were false and misleading. An examination of these articles will disclose that the Order was treated with great fairness by the League and

[67] *Fletcher* v. *Peck*, 6 Cranch 87; *United States* v. *Des Moines & Co.*, 142 U. S. 510; *United States* v. *Old Settlers*, 148 U. S. 427; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163; *Water Service Co.* v. *Redding*, 304 U. S. 252.

the Bargaining Agency, and the temperateness of these articles contrasts favorably with the treatment of the Order in the Dairy Farmers' Union, which opposed the Order (Ex. 27 to stip., R. 274, Tr. 9421–9423). As pointed out *supra*, p. 46, the claim as to the alleged falsity of the articles published in the Dairymen's League News and the Milk Producers Market News is based upon a failure to appreciate that a fine-spun legal argument might be made distinguishing between payment to producers and payment to co-operative associations of producers. No inference of wrongful intent can be drawn from the failure to anticipate such an argument.

There is some evidence in the record which might support a finding that the Bargaining Agency exerted pressure on handlers by withholding milk until they signed marketing agreements (R. 276), but the evidence on this point is far from conclusive (R. 368). Even if we accept as an established fact that the Bargaining Agency did withhold milk from one or more handlers, this in no way tends to prove any improper motive or conspiracy. The inference to be drawn from this action would seem to be that the Bargaining Agency believed that Order No. 27 was for the benefit of producers and intended to see to it that handlers complied with this Order, by agreeing with the Secretary to do so—the signing of the marketing agreements being an expression of compliance. Moreover, any coercion or duress on the part of the Bargaining Agency, if it did take place, took place after the issuance of the Order and after its effective

date and could in no way affect its validity since the Order was issued pursuant to the provisions of Section 8c (9) of the Act. The section expressly provides that orders shall be valid even if 50% of the handlers do not sign a marketing agreement, providing the required determination is made by the Secretary and approved by the President. Such determination was made and such approval secured. Hence, the signing of the marketing agreement whether voluntarily or because of economic coercion could not affect the validity of the Order.

The whole theory of the alleged conspiracy which is asserted by appellees is that the Bargaining Agency and the League conspired to procure the adoption of an order containing discriminatory provisions. The discussion of the provisions of Order No. 27, *supra*, pp. 48–60, demonstrates that the provisions of the Order are not discriminatory. Since the objective sought by the Bargaining Agency and the League is shown to have been legitimate, it follows that there is no basis for any inference that the activities outlined above proceeded from any improper motive.

B. THE ACT AUTHORIZES THE GRANTING OF THE RELIEF DEMANDED

The power of the District Court to issue an injunction enjoining the appellees from violating Order No. 27 and commanding the appellees to comply with the provisions of said Order No. 27 as demanded in the bills of complaint in this cause has not been questioned. Section 8a (6) of the Act, which vests

the several district courts of the United States with jurisdiction "specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts," clearly vests the District Court with jurisdiction to grant the relief demanded.

Even though the Act contained no such specific provision, the interest of the United States in the enforcement of the Order gives appellant the right to apply to the District Court for equitable relief.[68]

C. THE APPELLEES ARE SUBJECT TO ORDER NO. 27

The appellees are all handlers as defined in Order No. 27. Each of the appellees is engaged in the handling of milk received by it at one or more plants operated by it and approved by the New York City Health Department for the receiving of milk to be sold in the marketing area. Milk received by the appellee Jetter Dairy Company, Inc., at its receiving plant, located at Bridgewater, New York, is shipped to the marketing area by rail through the State of New Jersey. Some of the milk received by the appellee Central New York Co-operative Association, Inc., at its receiving plant is shipped to the marketing area through the State of New Jersey. All milk handled by the appellees is sold in the marketing

[68] *In re Debs*, 158 U. S. 564. *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 367. *Missouri* v. *Holland*, 252 U. S. 416, 431.

area in competition with milk which travels to the marketing area through the current of interstate commerce. Unless the milk produced for sale in the marketing area which does not travel directly in the current of interstate commerce is subject to the same regulation as the milk which travels directly in the current of interstate commerce, the result will be discrimination against the milk which travels directly in the current of interstate commerce, and the district court found that the handling of milk by the appellees is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce (Pl. Fig. 33, R. 183–184).

This finding is supported by the evidence. The attempted regulation of the State of New York of milk produced in the State of New York, which is solely intrastate in character, failed largely because of the inability of the state to regulate the interstate milk. Since approximately 50% of the milk travels in the current of interstate commerce it follows that no attempt of the Federal Government to regulate the interstate milk can be successful unless the intrastate milk is subject to the same regulation. The power of Congress to regulate the price of milk sold in interstate commerce carries with it the power to regulate intrastate sales of milk so as to protect interstate commerce in milk from injury caused by burdensome discrimination. The principle of constitutional law which permits such regulation has been long established and was expressed by this Court in

National Labor Relations Board v. *Jones and Laughlin* 301 U. S. 1, as follows (p. 36):

> The congressional authority to protect inte state commerce from burdens and obstructio is not limited to transactions which can b deemed to be an essential part of a "flow" interstate or foreign commerce. Burdens an obstructions may be due to injurious actio springing from other sources. The fund mental principle is that the power to regula commerce is the power to enact "all appr priate legislation" for "its protection and a vancement" (*The Daniel Ball*, 10 Wall. 5 564); to adopt measures "to promote i growth and insure its safety" (*Mobile Cou* v. *Kimball*, 102 U. S. 691, 696, 697); " foster, protect, control, and restrain." *Seco Employers' Liability Cases, supra*, p. 47. S *Texas & N. O. R. Co.* v. *Railway Clerks, sup* That power is plenary and may be exerted protect interstate commerce "no matter wh the source of the dangers which threaten it *Second Employers' Liability Cases*, p. 5 *Schechter Corp.* v. *United States, supra.* though activities may be intrastate in ch acter when separately considered, if they ha such a close and substantial relation to int state commerce that their control is essent or appropriate to protect that commerce fr burdens and obstructions, Congress cann be denied the power to exercise that contro

* * * * *

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. *Id.* Under the Transportation Act, 1920, Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co., supra; Florida* v. *United States*, 282 U. S. 194, 210, 211. Other illustrations are found in the broad requirements of the Safety Appliance Act and the Hours of Service Act. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U. S. 612. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The

protective power extends to the former because it exists as to the latter.

This principle was again reiterated by this Court in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

The Congressional power to regulate prices in intrastate sales to protect prices fixed in interstate sales is precisely the same power as the power to regulate rates in intrastate transportation to protect the rates fixed in interstate transportation. Familiar decisions of this Court leave no doubt as to the existence of that power. *Houston, East & West Texas R. Co.* v. *United States* (Shreveport Case), 234 U. S. 342; *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *Colorado* v. *United States*, 271 U. S. 153; and see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328–329.

D. THE APPELLEES HAVE VIOLATED ORDER NO. 27

It is conceded that the appellee Jetter Dairy Company, Inc., has failed to pay its obligation to the Producer Settlement Fund for the months of October and November, 1938, and that the other appellees have failed to make their payments to the Producer Settlement Fund for the months of September, October, and November, 1938. The amounts due from each of the appellees are stated in paragraph 62 of the "Stipulation of Facts and Evidence" (R. 265, 269). The appellees other than the appellee Central New York Cooperative Association, Inc., concede that they have violated the Order, if the Order is valid.

The appellee Central New York Cooperative Association, Inc., while apparently conceding that it is a handler as defined in Order No. 27, asserts that it has not violated the Order because it claims that, even though the Order is valid, it is exempted from the equalization provisions of the Order by its terms. This claim for exemption is founded upon Article VI, section 1, paragraph 3, which permits a handler in computing his net pool obligation to "subtract pro rata out of each class the quantity of milk received from the handler's own farm." Reports filed by the appellee Central New York Cooperative Association, Inc., for the months of September, October, and November, 1938, purport to show that all milk handled by said appellees is produced on its own farms (Exs. 38–40 to stip. R. 269, Tr. 9494–9534). However, the appellee Central New York Cooperative Association, Inc., does not own any farms (R. 265, 269). It handles milk produced by its members upon their own farms and also the milk of approximately seventy-five producers who are not members of and have no written contract with said appellee (R. 265, 269). The contention that the milk is produced upon this appellee's "own farms" is based on the theory that this appellee is the agent of its producers in the distribution of milk. However, even though an agency relationship exists, it does not follow that Central New York Cooperative Association, Inc., is exempted from the operation of the equalization provisions of the Order. The language of the Order appears to be too clear to require any extensive

argument on this point. While a cooperative association is treated under the Order as the representative of producers, it is expressly included within the definition of a handler contained in section 1 of Order No. 27. To exempt a cooperative association from the equalization provisions of the Order would defeat the whole purpose of the Order. A cooperative association which has a fluid market at all times for all the milk of its members, and which meets its requirements during the short season by purchasing from other producers or from other handlers is not carrying its share of the burden of surplus milk, and to exempt such a cooperative from the equalization provisions of the Order would permit it to continue to evade its responsibility in this regard.[69]

The appellees claim that the Order contains certain nebulous and imaginary discriminations in favor of cooperative associations. The appellee Central New York Cooperative Association, Inc., is claiming a right to preferential treatment, which would constitute a real discrimination.

[69] The appellee Central New York Cooperative Association, Inc., is a completely dealer-controlled cooperative which was organized by a New York dealer for the purpose of evading the provisions of the New York Milk Control Law. The details of the organization are revealed in Ex. 231I to stip. (introduced by appellees), R. 274, 508-511.

CONCLUSION

For the foregoing reasons the decree of the court below dismissing the bill should be reversed.

Respectfully submitted.

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Appendix-A

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish* [3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect

[1] For annotations to the Agricultural Adjustment Act, as amended: for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2, (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement);

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating [4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secreta of Agriculture shall issue an order if he finds, and sets forth in s order, upon the evidence introduced at such hearing (in addition such other findings as may be specifically required by this sectio that the issuance of such order and all of the terms and conditi thereof will tend to effectuate the declared policy of this title w respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursu to this section shall contain one or more of the following terms a conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or t purpose for which it is used, and fixing, or providing a method f fixing, minimum prices for each such use classification which handlers shall pay, and the time when payments shall be made. F milk purchased from producers or associations of producers. Su prices shall be uniform as to all handlers, subject only to adju ments for (1) volume, market, and production differentials c tomarily applied by the handlers subject to such order, (2) the gr or quality of the milk purchased, and (3) the locations at whi delivery of such milk, or any use classification thereof, is made such handlers.

(B) Providing:

(i) for the payment to all producers and associations of pr ducers delivering milk to the same handler of uniform pric for all milk delivered by them: Provided, That, except in t case of orders covering milk products only, such provision approved or favored by at least three-fourths of the produce who, during a representative period determined by the Secreta of Agriculture, have been engaged in the production for mark of milk covered in such order or by producers who, during su representative period, have produced at least three-fourths the volume of such milk produced for market during such p riod; the approval required hereunder shall be separate a apart from any other approval or disapproval provided for h this section; or

(ii) for the payment to all producers and associations of pr ducers delivering milk to all handlers of uniform prices for a milk so delivered, irrespective of the uses made of such milk b the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, marke and production differentials customarily applied by the handlers su ject to such order, (b) the grade or quality of the milk delivere (c) the locations at which delivery of such milk is made, and (d a further adjustment, equitably to apportion the total value of t milk purchased by any handler, or by all handlers, among produce and associations of producers, on the basis of their *marketings*[1] milk during a representative period of time.

[1] The word "production" was deleted and the word "marketings" was substituted section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or pe
which may be marketed in or transported to any or all markets i
current of interstate or foreign commerce or so as directly to bu
obstruct, or affect interstate or foreign commerce in such comm
or product thereof, during any specified period or periods b
handlers thereof.

(B) Allotting, or providing methods for allotting, the amou
such commodity or product, or any grade, size, or quality the
which each handler may purchase from or handle on behalf o
and all producers thereof, during any specified period or pe
under a uniform rule based upon the amounts[6] sold by such prod
in such prior period as the Secretary determines to be repres
tive, or upon the current *quantities available for sale by*[7] such
ducers, or both, to the end that the total quantity thereof to be
chased or handled during any specified period or periods sha
apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amou
any such commodity or product, or any grade, size, or quality the
which each handler may market in or transport to any or all ma
in the current of interstate or foreign commerce or so as dir
to burden, obstruct, or affect interstate or foreign commerce in
commodity or product thereof, under a uniform rule based
the amounts which each such handler has available for cu
shipment, or upon the amounts shipped by each such handler in
prior period as the Secretary determines to be representative, or
to the end that the total quantity of such commodity or produc
any grade, size, or quality thereof, to be marketed in or transport
any or all markets in the current of interstate or foreign commer
so as directly to burden, obstruct, or affect interstate or foreign
merce in such commodity or product thereof, during any spec
period or periods shall be equitably apportioned among all o
handlers thereof.

(D) Determining, or providing methods for determining, the e
ence and extent of the surplus of any such commodity or produc
of any grade, size, or quality thereof, and providing for the co
and disposition of such surplus, and for equalizing the burden of
surplus elimination or control among the producers and han
thereof.

(E) Establishing, or providing for the establishment of, re
pools of any such commodity or product, or of any grade, siz
quality thereof, and providing for the equitable distribution of
net return derived from the sale thereof among the persons benefic
interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the prod
thereof specified in subsection (2) orders shall contain one or
of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair t
practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Mark
Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Mark
Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith ~~and not~~ for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

MILK PRICES

(18) *The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-*

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD.

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam: except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions [14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[15]

Sec. 2. The following provisions are enacted in section 1 of this act, are amended as follows:[16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended."; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 24 inclusive, supra.

by him, upon written application of any cooperative association incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

Appendix-B.

8-27

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

WASHINGTON, D. C.

ORDER SERIES—ORDER NO. 27

(Issued by the Secretary of Agriculture, August 5, 1938)

ORDER OF THE SECRETARY OF AGRICULTURE ISSUED PURSUANT TO PUBLIC ACT NO. 10, 73D CONGRESS, AS AMENDED AND AS REENACTED AND AMENDED BY THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, REGULATING SUCH HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA AS IS IN INTERSTATE COMMERCE, AND AS DIRECTLY BURDENS, OBSTRUCTS OR AFFECTS INTERSTATE COMMERCE

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area, would tend to effectuate the declared policy of said act, gave, on the 29th day of April 1938, notice of public hearings to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commissioner of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

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Whereas, the Secretary of Agriculture has found and proclaimed the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas, the Secretary of Agriculture finds that a pro rata assessment on handlers at a rate not to exceed 2 cents per hundredweight of Class I, II–A, and II–B milk handled will provide funds necessary for the proper administration of this order; and

Whereas, the Secretary of Agriculture finds, upon the evidence introduced at the said public hearings:

1. That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area; and that all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products, except as such milk is regulated by an order of the Commissioner of Agriculture and Markets of the State of New York, to which this order is complementary;

2. That the prices calculated to give milk handled in the marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to section 2 and section 8e of the act are not reasonable in view of the available supplies of feeds, the price of feeds, and other economic conditions which affect the supply and demand for such milk, and that the minimum prices fixed in accordance with the method set forth in this order are such prices as will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;

3. That this order regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement upon which hearings have been held;

4. That orderly marketing conditions for milk flowing into the New York metropolitan marketing area are so disrupted as to result in impairment of the purchasing power of such milk, and that the issuance of this order and all of its terms and conditions will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by said act, hereby orders that such handling of milk produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof according to article X, be in conformity to and in compliance with the terms and conditions hereinafter set forth.

Article I—Definitions

Section 1. **Definitions.**—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends certain provisions of Public No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York metropolitan milk marketing area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereinafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, or any other business unit.

5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area.

7. "Market administrator" means the agency, which is described in article II, for the administration of this order.

Article II—Market Administrator

Section 1. **Selection, Removal and Bond.**—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

Sec. 2. **Compensation.**—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

Sec. 3. **Powers.**—The market administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate and report to the Secretary complaints of violations of this order.

SEC. 4. **Duties.**—The market administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office and such branch offices as may be necessary.

SEC. 5. **Announcement of Prices.**—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II–A prices to be in effect for the following month, pursuant to section 1 of article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

ARTICLE III—CLASSIFICATION OF MILK

SECTION 1. **Basis of Classification.**—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association; *Provided*, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that, if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utiliza-

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

SEC. 2. **Classes of Utilization.**—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II–B milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of plain condensed milk or, except as set forth in paragraph 6 of this section, frozen desserts or homogenized mixtures.

4. Class III–A milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III–C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

7. Class III–D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

9. Class IV–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV—Minimum Prices

Section 1. Class Prices.—For milk containing 3.5 percent of butterfat received, during each month from producers or cooperative associations of producers at plants in the 201–210 mile zone, each handler shall pay per hundredweight not less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II–A milk shall apply to all Class I and Class II–A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Classes II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B shall apply to all milk of any handler in these classes unless such handler has milk in Class I to which the minimum price is not applicable, in which event the minimum III–A, III–B, III–C, III–D, IV–A, and IV–B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class I price	
	April thru July	August thru March
Cents per pound	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.80	2.05
20–24.9	2.00	2.25
25–29.9	2.20	2.45
30–34.9	2.20	2.65
35–39.9	2.40	2.65
40–44.9	2.60	2.85
45–49.9	2.80	3.05
Over 49.9	3.00	3.25

2. For Class II-A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class II-A price		
	March thru July	August thru October	November thru February
Cents per pound	*Dollars per cwt.*	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.30	1.35	1.50
20-24.9	1.50	1.55	1.70
25-29.9	1.70	1.75	1.90
30-34.9	1.85	1.90	2.05
35-39.9	2.00	2.05	2.20
40-44.9	2.15	2.20	2.35
45-49.9	2.30	2.35	2.50
Over 49.9	2.45	2.50	2.65

3. For Class II-B milk the price during each month shall be 10 cents higher than the Class III-A price.

4. For Class III-A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported: *Provided*, That in no event shall the Class III-A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter at wholesale in the Chicago market for such month, as reported by the United States Department of Agriculture, add 30 percent, multiply by 3.5, and add 7 cents.

LOCATIONS OF EVAPORATED MILK PLANTS

Mt. Pleasant, Mich.	Black Creek, Wis.	Jefferson, Wis.
Sparta, Mich.	Orfordville, Wis.	New Glarus, Wis.
Hudson, Mich.	Chilton, Wis.	Belleville, Wis.
Wayland, Mich.	Berlin, Wis.	New London, Wis.
Coopersville, Mich.	Richland Center, Wis.	Coldwater, Ohio
Greenville, Wis.	Oconomowoc, Wis.	Delta, Ohio

5. For Class III-B milk the price during each month shall be 20 cents higher than the Class IV-A price.

6. For Class III-C milk the price during each month shall be 10 cents higher than the Class IV-A price.

7. For Class III-D milk the price during each month shall be 7½ cents higher than the Class IV-A price.

3. For Class IV-A milk the price during each month shall be a price computed by the market administrator as follows: From the average of the highest prices reported daily during such month by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 4 cents, add 20 percent, and multiply by 3.5.

9. For Class IV-B milk the price during each month shall be a price computed by the market administrator as follows: Take the average of the weekly quotations, with differentials as indicated, from such of these markets as may issue quotations during such month; Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York; deduct 3 cents, and multiply by 9.45. In the absence of any such quotation the price for the preceding month shall be effective.

SEC. 2. **Butterfat Differentials.**—The minimum prices for Classes I, II-A, II-B, III-B, III-C, and III-D milk set forth in section 1 of this article shall be subject to payment of butterfat differentials pursuant to section 8 of article VII. The minimum prices for Classes III-A and IV-A milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the respective prices set forth in paragraphs 4 and 8 of section 1 of this article, divided by 35. The minimum price for Class IV-B milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the price set forth in paragraph 9 of section 1 of this article divided by 3.45 and multiplied by 0.23.

SEC. 3. **Transportation Differentials.**—The market administrator shall from time to time publicly announce for each plant operated by each handler the freight zone set forth in the schedule below in this section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by more than 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts as set forth in the following schedule:

A	B	C	D
Freight zone miles	Class I, Cents per cwt.	Classes II-A, II-B, III-B, and III-C, Cents per cwt.	Class III-A, Cents per cwt.
1-10	+15	+8	+4
11-20	+14	+8	+4
21-25	+13	+8	+4
26-30	+13	+7	+4
31-40	+13	+7	+4

A	B	C	D
Freight zone miles.	Class I. Cents per cwt.	Classes II-A, II-B, III-B, and III-C. Cents per cwt.	Class III-A. Cents per cwt.
61-65	+10.5	+6	+3
66-70	+9.5	+6	+3
71-75	+8	+6	+3
76-80	+8	+5	+3
81-90	+8	+5	+3
91-100	+7	+5	+3
101-110	+7	+4	+2
111-120	+6	+4	+2
121-125	+5	+4	+2
126-130	+5	+3	+2
131-140	+5	+3	+2
141-150	+3.5	+3	+2
151-160	+2.5	+2	+1
161-170	+2.5	+2	+1
171-175	+1.5	+2	+1
176-180	+1.5	+1	+1
181-190	+1.5	+1	+1
191-200	0.0	+1	+1
201-210	0.0	0	0
211-220	−1	0	0
221-225	−1	0	0
226-230	−1	−1	0
231-240	−2	−1	0
241-250	−2	−1	0
251-260	−3.5	−2	−1
261-270	−3.5	−2	−1
271-275	−3.5	−2	−1
276-280	−3.5	−3	−1
281-290	−4.5	−3	−1
291-300	−5.5	−3	−1
301-310	−5.5	−4	−2
311-320	−5.5	−4	−2
321-325	−7	−4	−2
326-330	−7	−5	−2
331-340	−7	−5	−2
341-350	−8	−5	−2
351-360	−8	−6	−3
361-370	−8	−6	−3
371-375	−9	−6	−3
376-380	−9	−7	−3
381-390	−9	−7	−3
391-400	−9	−7	−3
401-410	−10.5	−8	−4
411-420	−10.5	−8	−4
421-425	−10.5	−8	−4
426-430	−10.5	−9	−4
431-440	−11.5	−9	−4
441-450	−11.5	−9	−4
451-460	−11.5	−10	−5
461-470	−12.5	−10	−5
471-475	−12.5	−10	−5
476-480	−12.5	−11	−5
481-490	−14	−11	−5
491-500	−14	−11	−5

Article V—Reports of Handlers

Section 1. **Preliminary Monthly Reports.**—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him: (a) The total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

Sec. 2. **Reports of Deliveries Per Day Per Producer.**—Each handler shall, upon request of the market administrator given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

Sec. 3. **Final Monthly Reports.**—On or before the 10th day of each month each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month:

1. The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk moved out of such plant during such month or on hand at such plant at the end of such month, the butterfat content of each product; and the destination of any milk which moved out of such plant;

3. If classification of any milk is claimed by such handler on the basis of utilization at some other plant, the utilization of such milk, together with written consent for verification by audit thereof signed by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of such handler's net pool obligation.

Sec. 4. **Verification of Reports and Payments.**—The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records. Each handler shall, during the usual hours of business, make available to the market administrator or his representative such of his records and facilities as will enable the market administrator to:

1. Verify the receipts and utilization of all milk required to be reported pursuant to this article, and, in case of errors or omissions, ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

3. Verify the payments to producers prescribed in article VII.

Article VI—Determination of Uniform Price

Section 1. **Net Pool Obligation of Handlers.**—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

1. Determine the total quantity of milk in each class at each plant;

2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

3. Subtract pro rata out of each class the quantity of milk received om the handler's own farm;

4. Subtract from the remaining quantity of milk in each class, the antity of each to which the prices in section 1 of article IV do not ply, which result shall be known as the "net pooled milk" in each ss;

5. Multiply the total quantity of net pooled milk in each class, at plants of the handler combined, by the respective class prices set th in section 1 of article IV and add together the resulting sums;

6. Deduct, in the case of each plant where the average butterfat ntent of all milk received from producers is in excess of 3.5 percent d add in the case of each plant where the average butterfat content all milk received from producers is less than 3.5 percent, an amount ual to the difference between the total value of the butterfat differtials on net pooled milk in Classes III–A, IV–A, and IV–B at the tes set forth in section 2 of article IV for such milk and the total lue of the butterfat differentials on such milk as set forth in section of article VII;

7. Deduct, in the case of each plant nearer New York City than e 201–210 mile zone, and add, in the case of each plant farther from w York City than the 201–210 mile zone, an amount equal to the fference between the sum of the respective transportation differtials, as set forth in section 3 of article IV, on all net pooled milk Classes II–A, II–B, III–A, III–B, and III–C and the sum obtained by applying the appropriate zone differential set forth in lumn B of the schedule in section 3 of article IV to the total net oled milk at each plant in Classes II–A, II–B, III–A, III–B, III–C, I–D, IV–A, and IV–B.

8. Deduct 20 cents per hundredweight for all net pooled milk ceived from producers at plants in the counties or portions of unties listed below in this section. The result thus obtained shall known as the "handler's net pool obligation."

New Jersey counties

Hunterdon	Union	Sussex
Somerset	Morris	Passaic
Essex	Warren	

New York counties

Columbia	Orange	Westchester
Dutchess	Putnam	
Nassau	Suffolk	

Towns in Ulster County, New York

Marbletown	Rosendale	Gardiner
Hurley	Esopus	Plattekill
Kingstown	New Paltz	Marlborough
Ulster	Lloyd	Shawangunk

Connecticut	Massachusetts
Litchfield County	Berkshire County

SEC. 2. **Computation of the Uniform Price.**—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

1. Combine into one total the net pool obligations of all handlers;
2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;
3. Add the amount of cash in the producer settlement fund;
4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and
5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201–210 mile zone.

ARTICLE VII—PAYMENTS TO PRODUCERS

SECTION 1. **Time of Payment.**—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made.

SEC. 2. **Transportation and Location Differentials.**—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI.

SEC. 3. **Butterfat Differential.**—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SEC. 4. **Grade A Premiums.**—In addition to the uniform price and all other payments required pursuant to this article, each handler shall pay for milk which is qualified under the New York City Department of Health requirements for sale as Grade A milk and which is delivered to a plant similarly qualified, an amount per hundredweight equivalent to the following differentials on that Class I milk which such handler sold in the marketing area as Grade A milk;

Butterfat content	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000
Percent	Cents per cwt.	Cents per cwt.	Cents per cwt.
3.7	60	42	5
3.8	66	48	7.5
3.9	72	54	10
4.0 and above	78	60	12

SEC. 5. **Payments to Cooperative Associations.**—Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. After such determination, the cooperative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

SEC. 6. **Market Service Payment.**—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was, during any month except Novem-

ber or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus $\frac{1}{10}$th of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SEC. 7. **Producer Settlement Fund.**—The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9, and 10 of this article, and to cooperative association of producers pursuant to section 5 of this article.

SEC. 8. **Payments to the Producer Settlement Fund.**—Each handler shall on or before the 18th day of each month pay to the market administrator for payment to producers through the producer settlement fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SEC. 9. **Payments Out of Producer Settlement Fund.**—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handler and shall complete such payments as soon as the necessary funds are available. No handler who, on the 25th day of the month, has not received the balance of such reduced payment from the market administrator shall be deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SEC. 10. **Adjustments of Errors in Payments.**—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. When-

ror verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure.

ARTICLE VIII—EXPENSE OF ADMINISTRATION

SECTION 1. **Payment by Handlers.**—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II-A, and II-B, the exact amount to be determined by the market administrator subject to review by the Secretary. This section shall not be deemed to duplicate any similar payment by any handler under any order issued by the Commissioner of Agriculture and Markets of the State of New York to which this order is complementary.

ARTICLE IX—SUSPENSION, TERMINATION AND LIQUIDATION

SECTION 1. **Continuing Obligation of Handlers.**—Unless otherwise provided by the Secretary in any notice of amendment, termination or suspension of any or all of the provisions hereof, such amendment, termination or suspension shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination or suspension; or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violations.

SEC. 2. **Continuing Power and Duty.**—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Secretary shall direct; and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property and claims vested in the market administrator pursuant to this order.

SEC. 3. **Liquidation.**—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control,

together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

Article X—Effective Time

Section 1. **Effective Time.**—This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the act.

In witness whereof, I, H. A. Wallace, Secretary of Agriculture of the United States, have executed in duplicate and issued this order to become effective in accordance with article X hereof, and caused the official seal of the Department of Agriculture to be affixed hereto in the city of Washington District of Columbia, this 5th day of August 1938.

H A Wallace

Secretary of Agriculture.

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